No. 80-441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OIL COMPANY, *et al.*,

Petitioners,

vs.

WESLEY P. BERNARD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

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Question Presented*

Whether the district court's several orders restraining communication by plaintiffs and their attorneys with members of the potential class in this civil rights action violated the Constitution or the Federal Rules of Civil Procedure, where there were no findings of any improper conduct by plaintiffs or their counsel, the uncontradicted evidence demonstrates no misconduct by them, and no evidentiary hearing was ever held.

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*/ Respondents do not accept petitioners' formulation of the question presented. See, Sup. Ct. Rule 34.2. First, three orders were issued barring communications, not one. Second, the district court made no findings of any abuse, actual or potential, and the Fifth Circuit panel opinions (JA 195, n.14, 209-210 and n.9) and the en banc court (JA 241 and n.7) found petitioners' allegations of specific abuse "irrelevant." Moreover, petitioners' brief cites no "actual" abuse, and refers only to unsupported "threats of abuse" and "threatened abuses." Brief for Petitioners, pp. 11, 22, 36. Third, although petitioners' question raises only the issue of the constitutionality of the several orders, their brief, pp. 14-26, also considers whether the orders comply with Rule 23, Fed. R. Civ. Pro., as did the Fifth Circuit. (JA 190-195, 208-216, 268, 269-276).

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ABA Code of Professional Responsibility, EC 2-3 57

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II ABA Comm. on Ethics and Professional Responsibility, Informal Ethics Opinions, Inform. Op. No. 1283, Nov. 20, 1973 (ABA 1975) 55

ABA Comm. on Professional Ethics and Grievances, Opinions, No. 148, 1935 (1957) 36, 53, 57

Advisory Comm. Notes, Proposed Rules of Civil Procedure, 39 F.R.D. 69 (1966) 98

Comment, Judicial Screening of Class Action Communications, 55 N.Y.U. L. Rev. 670 (1980) (forthcoming) ... 50

Comment, Restrictions on Communication by Class Action Parties and Attorneys, 1980 Duke L.J. 360 50

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118 Cong. Rec. 7168 (1972) 103

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Manual for Complex and Multi-District Litigation, 49 F.R.D. 217 (1970) 15

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Note, The Right To Counsel in Civil Litigation, 66 Colum. L. Rev. 1322 (1966) 85

S. Rep. No. 94-1011, Civil Rights Attorneys' Fees Awards Act of 1976, 94th Cong., 2d Sess. (1976) 44

Seymour, The Use of "Proof of Claim" Forms and Gag Orders in Employment Discrimination Class Actions, 10 Conn. L. Rev. 920 (1978) 50, 67, 79

U.S. Bureau of the Census, 1970 Census of Population: General Social and Economic Characteristics, PC (1)-(45) (Texas) 96

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IN THE

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GULF OIL COMPANY, et al.,

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vs.

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On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS

Statement of the Case[1/]

This employment discrimination action was filed by six present or retired black employ-

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1/ "Understanding the issues requires a more complete history than [a] brief statement," as the Fifth Circuit observed. (JA 199, see 234). Cf., NAACP v. Button, 371 U.S. 415, 419-426 (1963). Petitioners' cursory statement of the case, Br, pp. 3-7, provides an inaccurate account of the record.

ees of Gulf Oil Company's Port Arthur, Texas refinery (hereinafter "Gulf") against Gulf and the Oil Chemical and Atomic Workers International Union and Local Union No. 4-23 (hereinafter "unions") for violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (JA 11).[2/] The issue is the validity of three orders of the district court restraining communication by plaintiffs and their counsel with potential class members.

Administrative Proceedings

In June 1967, three of the plaintiffs, Wesley P. Bernard, Hence Brown, Jr., and Willie Johnson filed charges of racial discrimination with the Equal Employment Opportunity Commission (hereinafter "EEOC") against Gulf and the local union

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2/ Citations are to the Joint Appendix (hereinafter "JA"). The Brief For Petitioners will be referred to hereinafter as "Br."

pursuant to Title VII. (JA 177).[3/] The EEOC investigated and issued decisions of reasonable cause sustaining the three charges in August 1968. (JA 178). On February 26, 1975, the three complainants received letters from the EEOC stating that Gulf and the local union did not wish to continue conciliation discussions, and that they could request, at any time, notices of right to sue pursuant to Title VII. (JA 178, n.2). See, 42 U.S.C. § 2000e-5(f)(1).

Meanwhile, a separate charge of discrimination on the basis of both race and sex at the Port Arthur refinery was filed against Gulf by a Commissioner of the EEOC in 1968. (JA 26). See, 42 U.S.C. § 2000e-5(b). Reasonable cause was found to sustain the charge, and Gulf commenced conciliation discussions with the EEOC and the Office of Equal Opportunity of the United States Department of the Interior. Eventually, a

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3/ Overall, more than 40 charges of employment discrimination were filed by black employees with the EEOC against the company in 1967. Brief for the Equal Employment Opportunity Commission, Amicus Curiae, On Rehearing En Banc, 5th Cir., 77-1502, at 2.

conciliation agreement was signed by Gulf, EEOC and the Department of the Interior on April 14, 1976. (JA 26).

The conciliation agreement provided relief in three primary areas: "back pay,"[4/] "goals and timetables" for upgrading certain employees,[5/]

4/ Back pay was provided to black persons employed by Gulf on July 2, 1965, whose seniority date anteceded July 1, 1957, and to hourly rated women employed in Gulf's Package and Grease Department on July 2, 1965. (JA 28). The formula for back pay for black employees was $5.62 for each month of continuous service prior to January 1, 1957, and $2.81 for each month of continuous service thereafter until termination or until January 1, 1971, whichever is earlier. (JA 30). Back pay for female employees was figured on the basis of $5.62 for each month of continuous service until termination or until July 1, 1975, whichever is earlier. Id.

5/ Black employees who were eligible for back pay and were presently employed in certain menial positions (Operator Helper No. 1, Boiler Washing "X," Brander "X," Operator Helper No. 2, Utility Helper and Laborer) and women employees with seniority anteceding April 5, 1974, were made eligible for "affirmative action goals and timetables". (JA 32). The relief involved a goal to

and a general "affirmative action" provision.[6] The agreement required that employees accepting back pay execute releases of all employment discrimination claims against Gulf, and it established a procedure for tender and acceptance of back pay (JA 31). The agreement further provided

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5/ continued

fill one of every five vacancies in 43 "target classifications" (identified as classifications in which blacks, Spanish-surnamed persons and/or women were statistically underrepresented), and a goal to fill one of every seven official and manager category positions with a black, Spanish-surnamed or female employee until their respective representation jointly within such clasification equalled or exceeded their joint representation in the company's workforce. (JA 32-35).

6/ "[Gulf] agrees to refine and strengthen on a continuing basis positive and objective nondiscriminatory employment standards, procedures and practices and represents that in its business operations it exerts continuing effort to uniformly apply such standards, practices, and procedures in a manner which will assure equal employment opportunites in all aspects of its total workforce and operation without regard to race, color, religion, sex or national origin."

(JA 38).

that failure to respond within thirty days to notice of the tender and the release agreement was to be deemed an acceptance of back pay. (Id.) However, the letter which Gulf sent to eligible employees did not inform them that silence would be deemed an acceptance.[7/] Contrary to the terms of the agreement (JA 31), the letter did not disclose the formula used in calculating back pay. The letter admonished employees that, "Because this offer is personal in nature, Gulf asks that you not discuss it with others." Gulf represents that letters offering over $900,000 in back pay were sent to 614 black employees and former employees and 29 women employees immediately after the agreement was signed. (JA 22-23).

Neither the plaintiffs nor any members of the potential class were parties to the conciliation

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7/ This letter is reproduced as Addendum A to this brief. Although the letter does not appear in the record as transmitted by the district court, that court referred to and briefly described the letter in its order of June 22, 1976. (JA 128). The letter was also before the court of appeals. See Brief for the United States as Amicus Curiae on Rehearing En Banc, p.6 and Exhibit 1. Therefore, the letter may properly be considered by this Court.

agreement, nor was the agreement subject to any judicial review or approval. The plaintiffs found the relief provided in the conciliation agreement grossly inadequate.[8/] Under the agreement a black employee who, like plaintiff Wesley

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8/ In a memorandum filed in the district court, plaintiffs stated in part as follows:

> "... [T]he agreement on its face does not appear to satisfy the dictates of Title VII. For instance, the Conciliation Agreement does not provide for well-established types of relief such as advance-level entry and job by-pass; there is a one-shot opportunity to bid and transfer into a different job classification; there are no provisions for a firm recruitment program; there is no firm commitment on goals and timetables; the affirmative action program is merely a statement of policy rather than a realistic, programmatic approach to the underutilization of minorities in the defendant's work-force. The goals provided, one black, Mexican-American, or woman for each four whites selected for jobs from which blacks are underutilized (the goals is one to six for supervisory positions) is inadequate to remedy the practices of discrimination in an area where over 50% of the population is black; there is no relief from unlawful employment testing programs. These are only some of the examples of how the Agreement does not begin to

Bernard, had worked at Gulf's Port Arthur refinery since June 1954, was entitled to a total "back pay" settlement of approximately $640, less deductions for social security and income taxes.[9] Therefore, plaintiffs filed this action in the district court.

8/ continued

> approach the relief requested by the plaintiffs. In fact, the settlement agreement simply does not satisfy the purpose underlying fair employment litigation which is to make whole those persons injured by discriminatory employment practices. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).
>
> "Additionally, the notices that were sent out to back pay eligibles under the Conciliation Agreement did not explain the types and extent of relief in the agreement, and did not explain the method by which backpay was computed. Further, the affected employees were not told that acceptance of the agreement would be assumed if after the passage of thirty days, the employees had not responded to Gulf's notice...."

(JA 108, 109). See, infra n.67.

9/ See, supra, p. 4, n.4.

Plaintiffs' Complaint and Their Counsel

On May 18, 1976, plaintiffs[10] filed this suit as a class action in the United States District Court, Eastern District of Texas, Hon. Joe J. Fisher, Chief Judge, presiding. (JA 11). The complaint alleged that "[b]lack employees of Gulf Oil are, and have in the past, been victims of systematic racial discrimination" by Gulf and the unions. (JA 15).[11] The relief sought by the

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10/ Plaintiff Wesley P. Bernard was hired by the company in June 1954 as a laborer and at the time of filing was a truck driver. Plaintiff Elton Hayes, Sr. was hired in October 1946 as a laborer, worked in various "helper" positions and at the time of filing was a brickmaker. Plaintiff Hence Brown, Jr. was hired as a laborer in 1954 and at the time of filing was a truck driver. Plaintiff Willie Whitley was hired as a laborer in 1946 and retired as a utility man, a classification slightly above laborer, in October 1975. Plaintiff Rodney Tizeno was originally hired as a laborer and at the time of filing was employed as a craftsman. Plaintiff Willie Johnson was hired as a laborer. (JA 13, 14). Plaintiff Whitley died in 1980.

11/ Among the areas in which discrimination was alleged were: hiring and initial job assignments;

complaint included recruitment of blacks and the following measures for incumbent employees: (a) use of company seniority in bidding for better paying and more desirable jobs; (b) restructuring lines of progression, revision of residency requirements, advanced level entry and job skipping; (c) training; (d) back pay; (e) rate protection so black employees will not be deterred from advancement; (f) prospective "red circling" to alleviate the residual effects of discrimination; (g) suspension of all tests and other criteria for promotion and initial employment until the tests and criteria are validated; (h) requiring the local union to process grievances of its black members; and (i) a declaration that the acts and

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11/ continued

use of unvalidated and discriminatory tests and a high school diploma requirement; exclusion from craft and journeymen positions; racially separate lines of progression, job classifications and departments; denial of promotional training opportunities; unequal pay for comparable work; exercise of seniority rights; exclusion from supervisory, technical, professional and clerical positions; discipline and discharge; and the acquiescence in or condoning of unlawful discrimination by the unions. (JA 15-18).

practices complained of violate federal law. (JA 18-20). The complaint also specifically prayed for an award of costs, including reasonable attorneys' fees pursuant to 42 U.S.C. § 2000e-5(k). (JA 20).

Plaintiffs and the potential class were represented by attorneys associated with the NAACP Legal Defense and Educational Fund, Inc. (hereinafter "NAACP Legal Defense Fund" or "LDF"), a non-profit corporation engaged in furnishing legal assistance in cases involving claims of racial discrimination. (JA 111).[12/] Three of plaintiffs'

12/ The NAACP Legal Defense Fund, which is entirely separate and apart from the National Association for the Advancement of Colored People, has been approved by the Appellate Division of the State of New York to function as a legal aid organization. (Id.) This Court has recognized the LDF as having "a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation" and engaged in "a different matter from the oppressive, malicious or avaricious use of the legal process for purely private gain." NAACP v. Button, supra, 371 U.S. at 433. Employment discrimination cases in which LDF counsel have appeared in this Court include Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975);

counsel--Jack Greenberg, Barry L. Goldstein and Ulysses Gene Thibodeaux--were employed by the Fund as staff attorneys. (JA 81-82 n.1, 111, 115). Stella M. Morrison of Port Arthur, Texas, and Charles E. Cotton of New Orleans, Louisiana, private practitioners with experience in fair employment litigation, were associated with the NAACP Legal Defense Fund as local counsel. (JA 81-82 n.1, 118).[13/] None of the attorneys has accepted or expects to receive any compensation from the named plaintiffs, from any plaintiffs who may be added, or from any members of the potential class. (JA 113, 119). Any counsel fees which they might obtain would come from an award

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12/ continued

and Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). Attorneys employed by the LDF have represented individuals in hundreds of civil rights cases in the Fifth Circuit and in the district courts of that Circuit. Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 539 n.14 (5th Cir. 1970).

13/ See, NAACP v. Button, supra 371 U.S. at 421, n.5. Since 1976, Mr. Thibodeaux has gone into private practice in Lake Charles, Louisiana. He remains one of plaintiffs' counsel.

by the court which, as expressly prayed for in the complaint (JA 20), would be taxed against defendants pursuant to 42 U.S.C. § 2000e-5(k). (JA 113, 119). Any award of fees to staff attorneys of the NAACP Legal Defense Fund would be paid over to LDF for support of its programs. (JA 113).

The May 28 Order

On May 22, 1976, four days after the complaint was filed, the named plaintiffs held a meeting in Port Arthur which was attended by members of the potential class. (JA 115, 118). Three attorneys for the named plaintiffs and potential class accepted an invitation to attend the meeting to discuss issues in the suit, types of relief requested, and administrative and legal problems in fair employment litigation, and to answer questions about the suit and conciliation agreement. (JA 116).

Five days after the meeting, Gulf filed a short motion, unverified and unsupported by any sworn statement, to limit communications with any potential or actual class member. (JA 21). The

motion was filed in Judge Fisher's absence and sought entry of an order pending his return. In its supporting memorandum (JA 22), Gulf's counsel described the conciliation agreement, set forth Gulf's efforts to tender back pay awards and solicit releases, and announced that Gulf had suspended mailings to employees pending court action. Counsel also asserted, without identifying any informant, that one of plaintiffs' counsel made allegedly unethical and improper statements at the May 22 meeting.[14/] The memorandum sought

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14/ "... [O]n Saturday, May 22, 1976, four days after the Complaint was filed in this action, an attorney for the Plaintiffs, Mr. Ulysses Gene Thibodeaux, appeared before approximately 75 actual or potential class members at a meeting in Port Arthur and discussed with them the issues involved in the case and recommended to those employees that they not sign the receipt and general release which has been mailed to them pursuant to the Conciliation Agreement. In fact, it is reported to Gulf that Mr Thibodeaux advised this group that they should mail back to Gulf the checks they had received since he could recover at least double the amount which was paid to them

entry of a proposed order limiting communication in order to "preserve the status quo."[15/] Gulf's proposed order was taken verbatim from "Sample Pretrial Order No. 15: Prevention of Potential Abuse of Class Action," Manual for Complex and Multidistrict Litigation (1970) p. 197. (Id.)[16/] Plaintiffs had no opportunity to submit contravening proof or to reply prior to the court's order.

The next day, District Judge William M. Steger granted the motion and entered Gulf's

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14/ continued

under the Conciliation Agreement by prosecuting the present lawsuit."

(JA 23, 24).

15/ Although Gulf now characterizes its motion as an "emergency" motion, Br. p. 5, none of the requisites for affidavit or verified pleading, hearing or notice for either a temporary restraining order or preliminary injunction were pleaded or supplied. Rule 65, Fed. R. Civ. Pro.

16/ Attached to the memorandum were the conciliation agreement and a letter from company counsel suspending further mailing of checks and other contacts pursuant to the conciliation agreement. (JA 26, 43).

proposed order ex parte. (JA 1).[17/] By its terms, the order forbade, without exception, all communications by parties or their counsel with any class member pending Judge Fisher's return. The text of the order is set forth in the Joint Appendix at pages 44-45. The order states that parties and their counsel "are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class members not a formal party to the action." Id. The forbidden communications included, but were not limited to, (a) solicitation of legal representation, (b) solicitation of fees, expenses and arrangements to pay fees and ex-

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17/ Gulf no longer maintains that the May 28 order was entered "without formal objection by Respondents." Compare, Petition for a Writ of Certiorari, p. 7, with, Br, p 5. Gulf represented in both courts below that Judge Steger's order was issued after hearing argument of counsel for plaintiffs and the company. (See, e.g., JA 48, 202). However, the record shows that the motion was granted ex parte with no argument or hearing. (JA 3). Plaintiffs filed a memorandum of law in opposition to the motion on June 10, 1976, only after receipt of notice of the court's order and, indeed, after the filing of Gulf's subsequent motion to modify the order. (JA 46). See, JA 4, 80.

penses, (c) solicitation to opt out of Rule 23(b)(3) actions, and (d) communications "which may tend to misrepresent the status, purposes and effects of the class action, and of impressions tending, without cause, to reflect adversely on any party, any counsel, the Court, or any administration of justice." (Id.) No findings of fact or conclusions of law were made, and the Fifth Circuit considered Gulf's allegations of abuse "irrelevant." (JA 195 n.14, 209-210 and n.9, 241 and n.70).

The June 22 Order

On June 8, 1976, Gulf filed a motion to modify the May 28 order "to allow Gulf to comply with the terms of the Conciliation Agreement . . . by resuming under the Court's supervision the payment of back pay awards to employees covered by the Conciliation Agreement and obtaining from those employees receipts and releases all as provided for by the terms of the Conciliation Agreement." (JA 46). The supporting memorandum reiterated statements "reported to Gulf" about plaintiffs' counsel at the May 22 meeting, and

added that: "In fact, it is reported that Mr. Thibodeaux stated even if the employee had signed the receipt and release, he should now return the check which had been mailed to the employee by Gulf." (JA 47). Again, Gulf declined to provide any support for its hearsay allegations. However, Gulf did again attach the conciliation agreement and, in addition, the sworn affidavits of officials of the EEOC and Department of the Interior. (JA 71, 76).[18/]

On June 11, 1976, the district court heard argument of counsel, but heard no witnesses and took no evidence. (See, JA 203, 235). Thereafter, Gulf submitted a supplemental legal memorandum, a copy of the Manual for Complex Litigation (1973), Part II, § 1.41 Sample Pretrial Order No. 15, and a proposed order. (JA 92, 97, 99). Plaintiffs filed affidavits of counsel, which

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18/ The officials, who participated in the negotiation of the conciliation agreement, stated that, in their opinion, the agreement was a thorough and effective solution to charges that Gulf discriminated at its Port Arthur refinery in violation of Title VII, and that Gulf should be allowed to proceed with completing back pay awards and receiving releases under the conciliation agreement. (Id.)

stated that plaintiffs were represented by counsel associated with the NAACP Legal Defense Fund, explained the nature of the Fund's work, and stated that the only compensation plaintiffs' counsel expected would be through statutory taxation of costs and fees. (JA 107, n.1, 111, 115, 118). The affidavit of Mr. Thibodeaux directly contravened Gulf's account of his statements at the May 22 meeting.[19/] The affidavit of Ms. Morrison, another of plaintiffs' counsel who attended the meeting, corroborated Mr. Thibodeaux's affidavit. (JA 118). Counsel also averred that to date 34 individual members of the class had signed retainer agreements with plain-

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> "7. Contrary to the Company's assertion in its memoranda filed on May 27 and June 8, 1976, I did not at any time during the course of the meeting advise actual or potential class members not to accept the defendant's offer of settlement, nor did I state to the assembled group that counsel for the plaintiffs could obtain twice the amount of backpay for the class as has been offered to them under the Conciliation Agreement of April 14, 1976."

(JA 116).

tiffs' counsel to represent them in the litigation. (JA 119).

The affidavits of plaintiffs' counsel stated that communication with potential class members was necessary for effective representation of claims of class members, defining the scope of the issues, investigating claims of systematic and individual discrimination, preparing witnesses, supplementing available documentary materials and completing discovery, and generally informing class members of their rights and answering questions. (JA 113, 114, 116, 117).[20/]

On June 22, 1976, the district court modified the May 28 order, and adopted Gulf's proposed order based on the Manual for Complex Litigation. The June 22 order restrained communications by the parties and their counsel with members of the potential class, while authorizing the clerk of court to send a notice to class members offering

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20/ Plaintiffs also addressed Gulf's claim that the conciliation agreement was a thorough and effective resolution of employment discrimination at the Port Arthur refinery. See, supra, pp. 7-8, n.8.

back pay and soliciting releases under the conciliation agreement. The complete text of the order is reprinted in the Joint Appendix at pages 124-127, 189-191, n.9, and 236-238, n.4. The order reiterated the prohibition in the May 28 order, see, supra, at pp. 16-17, with two exceptions, viz., communications initiated by a client or prospective client, and communications by a public office or agency which do not have the effect of solicitation of representation or misrepresenting the action or orders. The order also provided that:

> "If any party or counsel for a party asserts a constitutional right to communicate with any members of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication, file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral."

(JA 125).

The court, relying on the Manual for Complex Litigation, rejected the contention that the restraint of communications was unconstitutional. The order also provided that Gulf be allowed to proceed with

the payment of back pay awards and obtaining of receipts and releases from those employees covered by the conciliation agreement and that the clerk of court mail an attached notice to each covered employee concerning acceptance of the offer within 45 days, and the order set forth a timetable for employee acceptances and for Gulf's reporting of acceptances.

The basis for entry of the order was not explained and no findings of fact or conclusions of law were made. "We can assume that the district court did not ground its order on a conclusion that the charges of misconduct made by Gulf were true. Nothing in its order indicates that it did, and, if it did, such a conclusion would have been procedurally improper and without evidentiary support." (JA 241) (Fifth Circuit en banc opinion).21/

21/ Petitioners erroneously refer to certain "facts supporting entry of the order." Br. pp. 22-23 and n.18, p. 25.

Judge Godbold noted that "Gulf restates hearsay as though it were fact proved and found." (JA 210, n.9). In this Court, Gulf continues to reiterate the alleged statements of plaintiffs' counsel. See, Br., pp. 5, 23 and n.18. The

The August 10 Order

The broad scope of the June 22 order was soon confirmed. On July 6, 1976, plaintiffs moved (a) for permission for themselves and their counsel to contact and interview members of the proposed class, and (b) to declare that an attached leaflet is "within the constitutionally protected rights of the plaintiffs and their counsel" and to permit its dissemination within the 45 day period allowed for members of the class to respond to the conciliation agreement tender pursuant to the June

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21/ continued

unsworn hearsay was rebutted by direct affidavit, which was the only evidence before the court. Gulf could have, but did not, present any countervailing proof.

The suggestions that the June 22 order was issued upon a complete record showing the class action process was threatened by abuse and after a hearing, see, Br, p. 22 and n.16, are also erroneous. Of the five affidavits submitted, the only affidavits on abuse were those of plaintiffs' counsel, which demonstrated that no unethical or improper conduct had occurred or was likely to occur. See, supra at p. 19. There was no evidentiary hearing. The district court merely heard oral argument by counsel, and Gulf never produced any evidence to substantiate its unsworn hearsay allegations. See, supra at p. 18.

22 order. (JA 130-131). The leaflet, inter alia, advised Gulf's black employees to consult a lawyer about the conciliation releases, offered the names, addresses and telephone numbers of several of plaintiffs' counsel for free consultation, and described the lawsuit. The original leaflet is reproduced in Addendum B to this brief.

Plaintiffs' motion for permission to communicate with the proposed class was denied on August 10, 1976, two days after the 45 day period for acceptance of back pay tenders had expired. (JA 157, see, 208, 236). The district court's order consisted of one sentence stating "that the Motion is hereby denied." (JA 157). No findings of fact or conclusions of law were made.

Other Proceedings

On January 11, 1977, the district court granted summary judgment for Gulf and the unions, dismissing the complaint as untimely. (JA 170). On appeal, a panel of the Fifth Circuit unanimously reversed the dismissal of the complaint but, by a divided court, affirmed the orders restraining

communications. (JA 175). Judge Godbold filed an extensive dissent on the communications issue. (JA 199).

On rehearing en banc, the Fifth Circuit, in an opinion authored by Judge Godbold, adopted the panel opinion insofar as it reversed the district court's dismissal of the complaint. (JA 231, 234). By a vote of twenty-one to one, the en banc court also reversed the orders restraining communications. (Id.) Thirteen members of the court held that the orders violated both the First Amendment and Rule 23, Fed. R. Civ. Pro. (Id.) Eight judges, agreeing that the orders were not authorized as "appropriate order[s]" under Rule 23, did not reach the constitutional issue. (JA 269, 276).

On December 8, 1980, the Court granted a writ of certiorari limited to the question of the validity of the orders restraining communications.

SUMMARY OF ARGUMENT

1. Communication by plaintiffs and their counsel with potential class members in a civil rights action, like other "'collective activity

undertaken to obtain meaningful access to the courts[,] is a fundamental right within the protection of the First Amendment.'" In re Primus, 436 U.S. 412, 426 (1978). Indeed, the right was first recognized in NAACP v. Button, 371 U.S. 415 (1963), in the context of communication by NAACP and NAACP Legal Defense Fund lawyers with putative plaintiffs concerning their participation in potential civil rights class action lawsuits.

2. The district court's orders restraining communication by plaintiffs and their counsel with the potential class were entered without any proof of actual or imminent specific misconduct or other injury. First Amendment rights cannot be impaired without such a threshold showing. The Manual for Complex Litigation simply does not provide particularized proof of misconduct adequate to justify any infringement.

3. The orders barring communication are unjustified prior restraints of protected expression and association. The provision in the June 22, 1976, order for assertion of "a constitutional right to communication" on pain

of criminal contempt does not require a different result because the orders remain a system of prior restraint which substantially burdens exercise of protected liberties.

4. The district court's orders are overbroad restraints in violation of the First Amendment rule that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." NAACP v. Button, 371 U.S. 415, 438 (1963).

5. In addition, the orders restraining communication compromised the integrity of the proceedings, and denied important rights of plaintiffs and the potential class guaranteed by the due process clause of the Fifth Amendment. In particular, adequate information, effective assistance of counsel, and an adequate hearing and procedural regularity were denied in violation of the Fifth Amendment.

6. Last, the district court's gag orders impede the prosecution and processing of class actions and, therefore, are inconsistent with Rule 23 of the Federal Rules of Civil Procedure, which permits only "appropriate order[s]" to be issued. Rule 23(d). The orders forbade plaintiffs and their counsel from engaging in activities "direct-

ed toward effectuating the purposes of Rule 23 by encouraging common participation in the litigation of ... discrimination claim[s]." Coles v. Marsh, 560 F.2d 186, 189 (3d Cir.), cert. denied, 434 U.S. 985 (1977). Moreover, Rule 23 should be construed to avoid grave doubts of unconstitutionality.

ARGUMENT

The record below is a virtual catalogue of the disruption that can be caused in Rule 23 actions by orders and local rules such as those recommended by §1.41 of the Manual for Complex Litigation, restraining communication by plaintiffs and their counsel with members of the potential class.[22/] The ability of plaintiffs

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22/ The Manual for Complex Litigation (1978), prepared by a Board of Editors for the Federal Judicial Center and Judicial Panel on Multidistrict Litigation, is reprinted in 1 Pt. 2 Moore's Federal Practice (2d ed. 1980) (hereinafter "Manual"). The Manual's Suggested Local Rule No. 7 and Sample Pretrial Order No. 15 are substantially identical. See, Manual, Pt. II, 225-228. The Manual is presently being revised. See Res-

and counsel to prosecute, and proper judicial management of the action both were grievously impaired.

The issue is not whether courts are powerless to deal with misconduct by counsel.[23/] The record reveals no findings of misconduct, and petitioners' unsupported allegations, reiterated here, were properly treated by all the Fifth Circuit opinions as "irrelevant." Nor is the Court presented with orders "drawn as narrowly as possible," Br, p. 8. The plain terms and operation of the orders simply explode such a

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22/ continued

pondents' Brief in Opposition to the Petition, pp. 18-19. Although a local rule is not before the Court, the same analysis under the Constitution and the Federal Rules of Civil Procedure applies to both rules and orders. See, JA 241 n.6, 252 n. 22 (Fifth Circuit en banc opinion).

23/ Where there has been misconduct by counsel, "[t]he ordinary remedy is disciplinary action against the lawyer and remedial notice to class members." Halverson v. Convenient Food Mart, Inc., 458 F.2d 927, 932 (7th Cir. 1972).

characterization. The May 28 order prohibited "all" communication by its terms and effect. See, supra at 16. The June 22 order prohibited "all" communications with four exceptions, but only one, the provision for "assert[ing] a constitutional right to communicate," as petitioners recognize, Br, p. 10, is of any conceivable significance here.[24/] The scope of the undefined protection offered by the provision is uncertain, and any possibility that the June 22 order could be saved by any such "escape hatch" was ruled out by the order of August 10 flatly denying any right to communicate with the class members. See, supra at pp. 23-24.

Nor is the Court presented with restraints based on "an overriding interest articulated in findings ..." Richmond Newspapers, Inc. v. Virginia, ___U.S. ___, 65 L.Ed.2d 973, 992 (1980). Although petitioners attempt to fill the gap by variously suggesting that the orders were issued

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24/ Petitioners advance no reason why the May 28 order was proper even though its ban on communications was the very kind of formal absolute prior restraint which they argue the June 22 order is not. Br, p. 10.

to "monitor" communications, to prevent generalized "threatened abuse" of the class action device or to forestall unspecified "misrepresentation," e.g., Br, pp. 17-26, the orders stated no purpose and none of the purposes now attributed to the district court have record support. Because plaintiffs and their counsel were completely gagged, a fortiori, no monitoring of their communication occurred. The district court's denial of plaintiffs' motion to communicate about pending back pay tenders and waivers was denied two days after the termination of the period for acceptance by the class members. Not only were no findings made, but no basis exists for finding any threat of abuse or misrepresentation. See, supra at pp. 14-19.

Petitioners' case boils down to the naked claim that "the very nature of the unique class action device creates sufficient justification for the entry of the order[s]." Br, p. 11. Plaintiffs' efforts to bring to the court's attention the adverse impact of its orders on the processing of the action were necessarily unavailing because the orders were not bottomed on

specific circumstances. They are restraints derived from §1.41 of the Manual, which recommends that in all class action suits, whether certified or not, communications by parties or counsel with actual and potential class members should be restricted. Id. at 31-32. The basis for this recommendation is the Manual's conclusion that "[t]he class action under Rule 23 is subject to abuse, intentional and inadvertent, unless procedures are devised and employed to anticipate abuse." Id. at 31. The Manual, however, concedes that abuse is the "exception rather than the rule" and "relatively rare."[25/]

Petitioners' brief invites this Court merely to sanction the exercise of Rule 23(d) supervisory

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25/ "It must be noted, however, that generally the experience of the courts in class actions has been favorable. The aforementioned abuses are the exceptions in class action litigation rather than the rule. Nevertheless, they support the idea that it is appropriate to guard against the occurrence of these relatively rare abuses by local rule or order."

Manual at 36-37. As we demonstrate later, this line of reasoning has no support in the jurisprudence of this Court. See, part I of the argument.

power. Br, p. 14. This characterization ignores that the communication subject to restraint is protected by the Constitution. Plainly, government "cannot foreclose the exercise of constitutional rights by mere labels" and "may not under the guise of prohibiting professional misconduct, ignore constitutional rights." NAACP v. Button, supra, 371 U.S. at 429, 439. The Court has

> "repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within [governmental] competence, or even because the laws do in fact provide a helpful means of dealing with such an evil ... [B]road rules framed to protect the public and to preserve respect for the administration of justice can in their actual operation significantly impair the value of associational freedoms."

United Mine Workers v. Illinois Bar Association, 389 U.S. 217, 222 (1967).[26/]

26/ First Amendment freedoms are protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental

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THE ORDERS RESTRAINING COMMUNICATION DENIED PLAINTIFFS, THEIR COUNSEL AND POTENTIAL CLASS MEMBERS MEANINGFUL ACCESS TO THE COURTS IN VIOLATION OF THE FIRST AMENDMENT.

A. Expression and Association To Advance Litigation Are Rights Protected by the First Amendment.

1. The Principle of NAACP v. Button

The Court has recently reaffirmed the principle, first recognized in NAACP v. Button, supra, that "'collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.'" In re Primus, supra, 436 U.S. at 426, quoting United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 585 (1971). "[A]bstract discussion is not the only species of communication which the Constitution protects; the

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26/ continued

interference." Bates v. Little Rock, 361 U.S. 516, 523 (1960); see, Shelton v. Tucker, 364 U.S. 479 (1960); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963).

First Amendment also protects vigorous advocacy, certainly of lawful ends, against government intrusion." Button, supra, 371 U.S. at 429.

The right of association for litigation was recognized in Button in the context of communication by NAACP and NAACP Legal Defense Fund attorneys with potential civil rights plaintiffs, both members and non-members. One purpose of the communication was to provide information about participation in class action challenges to public school segregation. The Court held that these communications are not unlawful and unethical solicitation of legal representation. 371 U.S. at 428-29.

> "In the context of NAACP objectives, litigation is not a technique for resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true for the opponents of New Deal legislation during the 1930's, for example, no less is it true of the Negro

> minority today. And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."

371 U.S. at 429-30.

Traditional rules against solicitation do not apply to "wholesome and beneficial" public interest litigation where legal services are offered to clients free of charge. See, e.g., ABA Committee on Professional Ethics and Grievances, Opinions, No. 148, 1935 (1957), cited by Button, 371 U.S. at 430 n.13, 440 n.19, 443 n.26.[27/] Button specifically ruled that the "superficial resemblance in form" between unethical arrangements for private gain which served no public interest, and the activities of NAACP and NAACP Legal Defense Fund lawyers

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27/ Opinion 148 approved the Liberty League's program of assisting litigation challenging New Deal legislation through a National Lawyers Committee which sought to disseminate through public media communications on the constitutionality of state and federal legislation, and to offer counsel, without fee or charge, to anyone financially unable to retain counsel who felt that such legislation violated his constitutional rights. See other authorities cited in Button, 371 U.S. at 440 n.19.

> "cannot obscure the vital fact that here the entire arrangement employs constitutionally privileged means of expression to secure constitutionally guaranteed civil rights.
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> * * *
>
> "Resort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain."

371 U.S. at 442-43.

Efforts to confine the scope of the Button doctrine have been uniformly denied. Thus, it was recognized that "the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act [45 U.S.C. §1 et seq.] and the Federal Employers' Liability Act [45 U.S.C. §51 et seq.]." Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 5 (1964). Unlike the precise facts in Button, the legal

rights involved were statutory, and the union recommended outside counsel whom it did not employ itself. Nevertheless, the Court held that "the Constitution protects the associational rights of the members of the union precisely as it does those of the NAACP." 377 U.S. at 8.[28/] United Mine Workers v. Illinois Bar Association, 389 U.S. 217 (1967), declined to limit the Button principle to prohibit union members from collectively hiring an attorney to litigate damage claims for personal injury and death under a state workers compensation act. A state court's order barring, inter alia, a union's efforts to limit the fee charged by recommended attorneys in damage suits to a percentage of recovery under the Federal Employers' Liability Act, was reversed in United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971). Again, the Court asserted that "the principle here involved cannot be limited to the

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28/ "The State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their rights. The right to petition the courts cannot be so handicapped." 377 U.S. at 7.

facts of this case. At issue is the basic right to group legal action ..." 401 U.S. at 585.

The principle of Button and its progeny was recently affirmed in In re Primus, 436 U.S. 412 (1978), where the Court reversed the disciplining of an attorney who advised a lay person of her legal rights concerning her sterilization. Counsel had sent a letter offering free legal assistance on behalf of the American Civil Liberties Union, a non-profit orginization with which the lawyer was affiliated, in order to bring a class action. Primus understood Button and subsequent decisions as having established the principle that association and expression on behalf of litigation are fundamental First Amendment rights.

> "Without denying the power of the State to take measures to correct the substantive evils of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, and lay interference that potentially are present in solicitation of prospective clients by lawyers, this Court has required that 'broad rules framed to protect the public and to preserve respect for the administration of justice' must not work a significant impairment of 'the value of associational freedoms.'"

436 U.S. at 426, quoting Mine Workers, supra, 389 U.S. at 222. The Court rejected efforts to limit the group litigation principle, by declining to distinguish Button because the ACLU might benefit financially from the litigation by a possible statutory award of attorneys' fees. 436 U.S. at 427-431.[29/]

Petitioners, however, do not acknowledge the "fundamental" nature of the right. Their characterization of the "generalized first amendment concerns of parties and their counsel" (Br, p. 10) deprecates Button and its progeny, and blinks at reality. The right of association and expression for litigation is not some abstract

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29/ The Court ruled that "the ACLU's policy of requesting an award of counsel fees does not take this case outside of the protection of Button." 436 U.S. at 429. The opinion relied on the fact that the NAACP and the NAACP Legal Defense Fund (the organizations involved in Button) often request fees. The Court noted that "differences between counsel fees awarded by a court and traditional fee-paying arrangements ... militate against a presumption that ACLU sponsorship of litigation is motivated by considerations of pecuniary gain rather than by its widely recognized goals of vindicating civil liberties." Id. at 429-430. For LDF lawyers, as well as ACLU

privilege of no significant moment: its denial infringes "the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." Brotherhood of Railroad Trainmen v. Virginia, supra, 377 U.S. at 7. In the instant case, prohibiting communication by plaintiffs and NAACP

29/ continued

lawyers, "[c]ounsel fees are awarded in the discretion of the court; awards are not drawn from the plaintiff's recovery, and are usually premised on a successful outcome." Id. at 430. The provision for statutory awards of attorney's fees from defendants distinguishes this litigation from contingency fee litigation in which fees are paid from the recovery. In the latter case, an incentive to enlarge the class may exist because of "the prospect of reducing [plaintiffs'] costs of litigation, particularly attorney's fees, by allocating such costs among all members of the class who benefit from any recovery." Deposit Guaranty Nat'l. Bank v. Roper, 445 U.S. 326, 338 n.9 (1980). Moreover, in civil rights cases the size of the class ordinarily has no bearing on the amount of fees, see, Zarate v. Younglove, 86 F.R.D. 80, 98 (C.D. Cal. 1980), which depends on statutory criteria. See, e.g., Copeland v. Marshall, 24 EPD ¶31,219 (D.C. Cir. 1980) (en banc); Northcross v. Board of Education, 611 F.2d 624, 632 et seq. (6th Cir. 1979), cert. denied, 100 S. Ct. 2999, 3000 (1980).

Legal Defense Fund counsel with potential class members impaired the plaintiffs' right to be "fairly represented," barred LDF attorneys from effectively prosecuting the action and from dissemination of critical information about the lawsuit and conciliation agreement to similarly situated black persons, and altogether denied the potential class "meaningful access to the courts." Button, 377 U.S. at 426. It is a "commonsense proposition" that such activity is protected. United Transportation Union v. State Bar of Michigan, supra, 401 U.S. at 580.[30/]

Petitioners argue that the Button principle does not apply because "the order was entered during ongoing litigation." Br, p. 29 n.29. This contention, like those rejected in the union

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30/ The purported conflict between the "competing values" of First Amendment command and a court's authority to impose broad prior restraint to protect against potential abuse (Br, p. 10) was resolved in Button and its progeny. "[W]e look at the [order] like we look at a statute, and if upon its face it abridges rights guaranteed by the First Amendment, it should be struck down." United Transportation Union, supra, 401 U.S. at 581.

referral cases and In re Primus, seeks to distinguish Button on its facts. But the constitutional right, as this Court has repeatedly said, is a broad protection for "collective activity undertaken to obtain meaningful access to the courts," and "the basic right to group legal action." United Transportation Union, supra, 401 U.S. at 585 (emphasis added). Nothing in the nature of the right to associate for litigation suggests that it terminates with the filing of the action. Indeed, the practical need for communication to prosecute, advance and develop litigation increases rather than diminishes with the filing of an action. See part II of the argument.

Moreover, in the instant case the prohibited communications were with potential class members who had to make a choice to participate in the lawsuit or to accept back pay under the conciliation agreement. Such persons in substance are in the same position as the potential plaintiffs in Button, the union members in the post-Button cases, or the potential plaintiff in In re Primus. Congress has determined that when a civil rights plaintiff obtains relief "he does so not for himself alone but also as a 'private attorney-

general,' vindicating a policy that Congress considered of the highest priority." Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401, 402 (1968); Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 211 (1972); Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975). Congress has therefore provided the courts with broad remedial powers[31/] and has authorized awards of counsel fees to encourage private attorney general enforcement of civil rights.[32/]

The Button principle has been applied outside the civil rights and civil liberties areas.[33/]

31/ Section 706(g) of Title VII, 42 U.S.C. §2000e-5(g). See, Franks v. Bowman Transportation Co., 424 U.S. 747, 763-764 (1976).

32/ Section 706(k) of Title VII, 42 U.S.C. §2000e-5(k); Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988. See, Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978); Newman v. Piggie Park Enterprises, Inc., supra; see generally, S. Rep. No. 94-1011, The Civil Rights Attorneys' Fees Awards Act of 1976, 94th Cong., 2d Sess. (1976).

33/ See, Brotherhood of Railroad Trainmen, supra (Safety Appliance Act and FELA); United Mine Workers, supra (state workers' compensation law);

The instant litigation therefore is well within the core of protected activity.

B. The Orders Infringe Upon First Amendment Rights Without Requisite Proof Of Misconduct.

1. Absence of Proof of Misconduct

At a minimum, the First Amendment rights at stake cannot be infringed without proof of

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33/ continued

United Transportation Union, supra (FELA). Although this Court need not decide the question, the right of associational activity in support of litigation should apply to any controversy proper for judicial resolution. Although this is an action for equitable relief, and not a damage suit, there is no distinction for purposes of associational rights since either form of relief may constitute proper enforcement of public policy. See, Button, supra (equitable school desegregation action); Brotherhood of Railroad Trainmen, supra; United Mine Workers, supra; United Transportation Union, supra; In re Primus, supra (damage suits).

specific misconduct. However, "[n]othing that this record shows as to the nature and purpose of NAACP [Legal Defense Fund] activities permits an inference of any [conduct] injurious" to the processing of the lawsuit. NAACP v. Button, supra, 371 U.S. at 444.[34/]

Reciting "potential abuse" cannot cure the constitutional defect.

> "[L]aws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within ... [governmental] competence, or even because the laws do in fact provide a helpful means for dealing with such an evil."

United Mine Workers, supra, 389 U.S. at 222. "Rights of political expression and association may not be abridged because of ... interests asserted by appellate counsel without substantial

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34/ Accord, United Transportation Union, supra, 401 U.S. at 584 ("The record is devoid of any evidence or allegation of ['practicing law'] on the part of the Union or its members. A decree must relate specifically and exclusively to the pleadings and proof.").

support in the record or findings of the ... court." In re Primus, supra, 436 U.S. at 434, n.27. The application of narrowly drawn rules is proper "to proscribe solicitation that in fact is misleading, overbearing, or involves other features of deception or improper influence." Id. at 438 (emphasis added).[35/]

"[T]o the extent that the district court is empowered to restrict certain communications in order to prevent frustration of the provisions of Rule 23, it may not exercise the power without a specific record showing by the moving party of the particular abuses by which it is threatened." Coles v. Marsh, supra, 560 F.2d at 189 (decided on Rule 23 grounds).[36/] Not only

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35/ Accord, Richmond Newspapers, Inc. v. Virginia, supra, 65 L.Ed.2d at 992; First National Bank of Boston v. Bellotti, 435 U.S. 765, 789-790 (1978); Wood v. Georgia, 370 U.S. 375, 388 (1962); Bridges v. California, 314 U.S. 252, 271 (1941).

36/ Compare, JA 271-272 (Tjoflat, J., specially concurring in the decision of the Fifth Circuit en banc):

> "[I]ssuance of an order .. without an adequate statement of the reasons for the order does not meet minimum standards of procedural

did petitioners here not present any proof of misconduct or threatened misconduct, they did not specify any discrete harm at all to the processing of the class action. All that was relied on were unspecific and speculative claims of "threatened abuse" and "misrepresentation." See, supra at pp. 14-19.

Indeed, the only harm to the class action was done by the orders barring communications. See, JA 213-214 (Godbold, J., dissenting from the panel decision).

2. The Manual for Complex Litigation

Nor can the vacuum caused by the absence of specific factfinding be filled by the recommendations of the Manual, which asserts that association and expression may be restrained across-the-

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36/ continued

> fairness and regularity ... Nor does an order issued without a deliberate articulation of its rationale, including some appraisal of the factors underlying the court's decision, allow for a disciplined and informed review of the court's discretion."

Sargeant v. Sharp, 579 F.2d 645, 647 (1st Cir. 1978) (citations omitted).

board in every class action notwithstanding the circumstances in a particular case. The Manual, at 31, concludes that broad prior restraint may be imposed because the class action is subject to "abuse", intentional or inadvertent. It argues therefore that procedures should be employed to anticipate abuse. The Manual concedes that abuses are "the exceptions in class action litigation rather than the rule" and are "relatively rare." Id. at 36-37. See, supra at p. 32, n.25.37/

Indeed, the Manual speaks throughout of mere "potential abuses," rather than actual or imminent

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37/ "[T]he hypothesis that abuses occur with such frequency and impact that prophylactic judicial intervention is required must be examined with the same scrutiny as other factual hypotheses. Neither the Constitution nor the judge's duty of constitutional fact finding is subsumed by the application of the pejorative word 'abuse.' Not everything that tends to make a class action less convenient than ideal, or more difficult to manage is an 'abuse'.... The frequency and the effect of genuine abuses in class actions in general are not revealed by any empirical data made known to us, and judges may differ widely in their invididual assessments."

abuse, as justifying restraint of fundamental First Amendment freedoms. When protected speech is alleged to threaten the administration of justice or the court's integrity, "'the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished'"; a "'solidity of evidence' ... is necessary to make the requisite showing of imminence"; and "'[t]he danger must not be remote or even probable, it must immediately imperil.'" Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 845 (1978); Craig v. Harney, 331 U.S. 367, 376 (1947); Wood v. Georgia, supra, 370 U.S. at 384, 393. See, Chicago Council of Lawyers v.

37/ continued

(JA 262-263) (Fifth Circuit en banc).

The Manual's recommended restrictions on communications have been critically analyzed. See, Comment, Judicial Screening of Class Action Communications, 55 N.Y.U. L. Rev. 670 (1980) (forthcoming); Comment, Restrictions on Communication by Class Action Parties and Attorneys, 1980 Duke L. J. 360; Seymour, The Use of "Proof of Claim" Forms and Gag Orders in Employment Discrimination Class Actions, 10 Conn. L. Rev. 920 (1978); Wilson, Control of Class Action Abuses Through Regulation of Communications, 4 Class Action Rpts. 632 (1975); 88 Harv. L. Rev. 1911 (1975).

Bauer, 522 F.2d 242, 249 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976). The standard is higher still for prior restraint.

The Manual identifies four potential abuses: (1) solicitation of legal representation; (2) solicitation of funds and agreements to pay fees and expenses; (3) solicitation by defendants of requests by class members to opt out in Rule 23(b)(3) class actions; and (4) unauthorized direct or indirect communications which "may misrepresent the status, purposes and effects of the action and of court orders therein and which may confuse actual and potential class members and create impressions which may reflect adversely on the court or the administration of justice." Manual at 31-32. However, the record does not demonstrate that any of these abuses occurred or was likely to occur in this case.

Three of the potential abuses, indeed, are totally inapplicable to the particular circumstances here. With respect to solicitation of legal representation, and of funds and agreements to pay fees and expenses, the uncontradicted affidavits of plaintiffs' counsel show that they

have not and will not solicit clients or funds. See, supra at pp. 11-13, 19.[38/] With respect to the third potential abuse, a prohibition of communications by defendants soliciting opt-out requests in Rule 23(b)(3) class actions does not apply to communications by plaintiffs in this Rule 23(b)(2) action. Thus, only the potential for misrepresentation is even arguably applicable to this case. But there is no proof that any misrepresentation was ever made or even threatened.

Indeed, even if one of these "potential abuses" had been demonstrated, there is substantial doubt that it would have justified the gag orders issued here, particularly in light of legal developments since the original promulgation of the Manual in 1970.[39/] Recent decisions of this

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38/ Counsel already represent plaintiffs who assert that they can adequately represent the interests of the potential class, and are providing representation at no cost to plaintiffs and the potential class. The only attorney's fees to which counsel may be entitled would be paid by defendants through taxation of costs by the court if plaintiffs prevail. Id.

39/ The terms of the suggested order and local rule have remained the same since the publication of the original Manual for Complex and Multi-

Recent decisions of this Court now establish that solicitation of legal representation, at least in some forms, is constitutionally protected activity. In re Primus, supra; Bates v. State Bar of Arizona, 433 U.S. 350 (1977).[40/] Instead of an across-the-board approach to prohibition of solicitation, the Court has thus confirmed that anti-solicitation measures must be adjudicated on a case-by-case basis. Even prior to 1970, NAACP v. Button and the union referral cases recognized that solicitation of legal representation is not per se unethical.[41/]

39/ continued

district Litigation, 49 F.R.D. 217, 229-230 (1970), except for the last two sentences concerning "communications protected by a constitutional right," which were added in a 1973 revision. Manual for Complex Litigation, Part II, §1.41, at 226 (1973).

40/ See also, Coles v. Marsh, supra; Halverson v. Convenient Food Mart, Inc., supra.

41/ See also, ABA Comm. on Professional Ethics and Grievances, Opinions, No. 148, 1935 (1957), discussed supra at p. 36, n.27. Solicitation of potential class members is permissible under the ABA Code of Professional Responsibility, DR 2-104(a).

As to solicitation of fees and expenses, since the Manual's suggested order and rule were drafted, "the Court has subsequently understood Cantwell [v. Connecticut, 310 U.S. 296 (1940)] to have implied that soliciting funds involves interests protected by the First Amendment's guarantee of freedom of speech. Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 761 (1976); Bates v. State Bar of Arizona, 433 U.S. 350, 363 (1977)." Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 629 (1980).[42/] Moreover, the ABA Committee on

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41/ continued

(1), providing that a lawyer may accept employment generated by his unsolicited advice from "one whom the lawyer reasonably believes to be a client," and under the ethical rule that a lawyer whose client will benefit from joinder of others similarly situated may seek out such additional claimants, if the lawyer's motive is not to secure additional fees. See, Halverson v. Convenient Food Mart, Inc., supra, 458 F.2d at 930-931 and authorities cited.

42/ Even prior to 1970, "our cases long have protected speech even though it is in the form of ... a solicitation to pay or contribute money,

Professional Ethics has determined that this kind of solicitation is also not invariably unethical.[43/]

With respect to solicitation by defendants of requests by class members to opt out of Rule 23(b)(3) actions, recent authority is divided as to whether such solicitation is unethical in the absence of demonstrated coercion or fraud.[44/]

42/ continued

New York Times Co. v. Sullivan," [376 U.S. 254 (1964)]." Bates v. State Bar of Arizona, supra, 433 U.S. at 363; Village of Schaumburg, supra, 444 U.S. at 633.

43/ Thus, it is permissible for a class representative to solicit money from potential class members to cover the expenses of a suit, II ABA Comm. on Professional Ethics, Informal Ethics Opinions, 537-540, Inform. Op. No. 1280, Aug. 8, 1973 (ABA 1975), and class action counsel are permitted to advance money to cover litigation costs. Id., at 544-547, Inform. Op. No. 1283, Nov. 20, 1973.

44/ Compare Matarazzo v. Friendly Ice Cream Corp., 62 F.R.D. 65, 69 (E.D N.Y. 1974), and Greisler v. Hardee's Food Systems, Inc., 1973 Trade Cases ¶ 74,455 (E.D. Pa. 1973), with Northern Acceptance Trust 1065 v. AMFAC, Inc., 51 F.R.D. 487, 491 (D. Hawaii 1971).

Assuming such a practice does raise ethical problems, specific remedies other than the Manual's blanket ban on communications are available, such as a remedial notice voiding improperly obtained opt-out requests.

As to communications which "may misrepresent" or "may create impressions tending, without cause, to reflect adversely on any party, any counsel, court or the administration of justice," the scope of this "potential abuse" is so vague and indeterminate that it necessarily includes protected and ethical communications. In Village of Schaumburg v. Citizens for a Better Environment, supra, the Court was of the view that a "legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly." 444 U.S. at 637. With respect to lawyer misrepresentation, the "precise contours of permissible ... regulation" were deliberately not drawn in In re Primus, supra, 436 U.S. at 438 n.33, and 439-440 (Blackmun, J., concurring), other than to permit precise

regulation where there is "in fact" misleading solicitation. Moreover, "[g]iving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laymen in recognizing legal problems," as long as the attorney is not "motivated by a desire to obtain personal benefit." ABA Code of Professional Responsibility, EC 2-3.[45/] The broad potential-for-misrepresentation prohibition, thus, may well invade the province of a lawyer's ethically proper communication.

The Manual, which is periodically updated, cites none of the recent authorities discussed above. It maintains instead that "experience continues to teach that it is dangerous to await the occurrence of an abuse before trying to correct it." Id. at 32 (Supp. 1978). The Manual, at 34, states that the recommended

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45/ See also, ABA Comm. on Professional Ethics and Grievances, Opinions, No. 148, 1935 (1957) (discussed supra at p. 36, n.27); see also, In re Sawyer, 360 U.S. 622, 631-632 (1959).

restrictions are the "result of unfortunate experiences where parties and counsel have abused the class action process," and then cites exemplary cases. However, none of the cases cited to document alleged abuse disclose a single instance of proven misconduct by plaintiffs or their counsel which would have been prevented by the suggested order or local rule. Manual, pp. 34-35 nn.34-42; see also, Br, p. 15 n.5.[46]

46/ Several cases concern restrictions based on a bare fear of potential abuse, rather than a situation which has "matured" into actual abuse. See, Ace Heating and Plumbing Co. v. Crane Co., 453 F.2d 30 (3d Cir. 1971); N.O.W. v. Minnesota Mining & Mfg. Co., 18 FEP Cases 1176 (D. Minn. 1977), appeal dism'd, 578 F.2d 1384 (8th Cir. 1978). Others present no issue of abuse. See, Weisman v. Darneille, 78 F.R.D. 671 (S.D.N.Y. 1978); Northern Acceptance Trust 1065 v. AMFAC, Inc., 51 F.R.D. 487 (D. Haw. 1971). One case concerned an improper determination of abuse. Korn v. Franchard Corp., 456 F.2d 1206 (2d Cir. 1972), rev'g, 1971 Sec. L. Rep. ¶92,845 (S.D. N.Y. 1971). In Korn, for example, the Second Circuit expressly refused to evaluate the propriety of the conduct of plaintffs' counsel in communicating with class members, but reversed the district court for condemning that conduct without giving the attorney adequate notice and hearing.

C. The Orders Impose Unconstitutional Prior Restraint on Protected Expression.

The comprehensive and detailed opinion of the Fifth Circuit en banc demonstrates the

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46/ continued

The gag orders are inapplicable in several cases. See, Reed v. Sisters of Charity of the Incarnate Word of Louisiana, Inc., 25 Fed. Rules Serv. 2d 331 (W.D. La. 1978); Carlisle v. LTV Electrosystems, Inc., 54 F.R.D. 237 (N.D. Tex. 1972), appeal dism'd, No. 72-1605 (5th Cir., June 23, 1972). For example, the gag orders could not reach the prefiling activity described in Carlisle (plaintiffs' attorney sought out people willing to have a class action instituted in their names as representatives of the class) or Reed (plaintiffs' counsel solicited institution of the suit during inflammatory speech).

Several cases demonstrate that there are less restrictive means to deal with possible abuses. See, Rothman v. Gould, 52 F.R.D. 494 (S.D. N.Y. 1971); Yaffe v. Detroit Steel Corp., 50 F.R.D. 481 (N.D. Ill. 1970) (the compromise of claims or solicitation by defendants of class members to opt

unconstitutionality of the orders as unjustified prior restraint of protected speech. (JA 241-267).[47/] Judge Godbold's opinion first

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46/ continued

out could have been remedied through the court's review of compromises under Rule 23(e)); Hawkins v. Holiday Inns, Inc., [1978-1] Trade Cases ¶61,838 (W.D. Tenn. 1978) (injunction and notice). Cf., Northern Acceptance Trust 1065 v. AMFAC, supra (efforts by defendants' counsel to obtain affidavits from members of a putative class indicating that they had not entered into any arrangements to be represented by plaintiffs' attorney, can be controlled by means of existing restrictions on communications by lawyers with persons having adverse interests). See, ABA Code of Professional Responsibility, DR 7-104.

Other "abuses" did no harm to potential class members, or to the management of the suit. See, e.g., Northern Acceptance Trust 1065 v. AMFAC, supra, and EEOC v. Red Arrow Corp., 392 F. Supp. 64 (E.D. Mo. 1974).

47/ Although the opinion speaks only of the June 22, 1976, order, the validity of all three orders is before the Court. See, supra at pp. 16, 20, 24. The June 22 order, in any event, is on its face the least restrictive of the three orders. A fortiori, the Fifth Circuit's opinion applies to the May 28 and August 10 orders as well.

scrupulously reviews and correctly applies this Court's cases in order to determine whether the orders constitute a system of prior restraint, looking to their origin, purpose, means of enforcement and means of constitutional challenge. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); Near v. Minnesota, 283 U.S. 697 (1931). (JA 241-252). After determining that the restrained expression is protected, NAACP v. Button, supra; In re Primus, supra (JA 252-256), the opinion then conducts an inquiry into whether the prior restraint is justified in the face of "'the heavy presumption against its constitutional validity.'" Southeastern Promotions, Ltd. v. Conrad, supra, 420 U.S. at 558, quoted in Vance v. Universal Amusement Co., 445 U.S. 308, 316 n.13 (1980). (JA 256-266). The court concludes that the orders (a) do not fit within any of the narrowly defined exceptions to the prohibition against prior restraint, (b) do not prevent "direct, immediate, and irreparable damage," New York Times Co. v. United States, 403 U.S. 713 (1971), in the least restrictive manner, and (c) do not comport with required procedural safe-

guards. The court therefore holds that the orders impose an unconstitutional prior restraint.

Because respondents submit that the en banc opinion's application of constitutional principles to this record is correct, we limit our discussion of prior restraint to replying to several arguments petitioners make against the en banc opinion.

First, petitioners argue that the orders are not a system of prior restraint because the June 22 order "allowed free exercise of speech without court approval" by virtue of the provision for asserting a constitutional right to communicate. Br, p. 32.[48/] Petitioners ignore com-

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48/ Petitioners cite Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979), and Kingsley Books v. Brown, 354 U.S. 436 (1957), in support of their contention that a prior restraint analysis is inappropriate because, in petitioners' view, the orders are the result of "reconciling competing constitutional values" of freedom of speech and the administration of justice. Br, pp. 31-32. In Smith, a statute which made it a crime for a newspaper to publish, without written court approval, the name of any youth charged as a juvenile offender could not be justified even as a penal sanction under Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978). 443 U.S. at

pletely both the May 28 order, which on its face was an absolute ban on communication, and the

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48/ continued

101, 102. "Since we conclude that this statute cannot satisfy the constitutional standard defined in Landmark Communications, Inc., we need not decide whether, as argued by respondents, it operated as a prior restraint." Id. Smith, therefore, does not support petitioners. See, e.g., Vance v. Universal Amusement Co., supra, 445 U.S. 316 n.13.

The language in Kingsley Books v. Brown, supra, 354 U.S. at 441, that prior restraint is not a "talismanic test," does not conflict with the presumption against prior restraints, the en banc opinion's meticulous analysis of the orders, or cases since Kingsley such as Southastern Promotions, Ltd. v. Conrad, supra, 420 U.S. at 558.

The prohibition against unjustified prior restraint does not somehow inhibit the reconciling of competing values. Rather, the presumption against prior restraint merely strikes the balance required by the First Amendment because "a free society prefers to punish the few who abuse

August 10 order, which, in fact, gutted whatever illusory exception for constitutionally protected speech existed in the June 22 order. The mere formal existence of an exception, in any event, is not enough to immunize a system of prior restraint. The Court has long deemed it necessary "to look through forms to the substance," Bantam Books v. Sullivan, 372 U.S. 58, 67 (1973),[49/] and not required that a provision "effect total suppression in order to create a prior restraint." Southeastern Promotions, supra, 420 U.S. at 556 n.8. See, Buckley v. Valeo, 424 U.S. 1, 52 (1976); Miami Herald Publishing Co v. Tornillo, 418 U.S. 241, 256 (1974); New York Times Co v.

48/ continued

rights of speech after they break the law than to throttle them and all others beforehand." Southeastern Promotions, Ltd. v. Conrad, supra, 420 U.S. at 559.

49/ "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker before an adequate determination that it is unprotected by the First Amendment." Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 390 (1973) (emphasis added).

Co. v. Sullivan, 376 U.S. 254, 279 (1964).[50/]

Second, petitioners argue that the "exception" for constitutionally protected communication is "broad" and "limits severely the scope of the information subject to prior scrutiny." Br, p. 32. The June 22 order prohibits all communications, but ambiguously requires that a party or counsel who "asserts a constitutional right to communicate" file a copy of any written communication or a summary of any oral communication within five days after the communication. (JA 100, 101). In rejecting a similar effort to save an unconstitutional provision, the Court held that,

> "[i]f there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights."

50/ Contrary to petitioners' suggestion, Br, p. 32, Gannett Co. v. DePasquale, 433 U.S. 368, 393 (1979) ("any denial of access in this case was not absolute but only temporary") (emphasis added), does not require an absolute ban to trigger prior restraint analysis.

NAACP v. Button, 371 U.S. at 438. The district court's August order, in any event, demonstrates why courts "will not presume that the statute curtails constitutionally protected activity as little as possible." Id. at 432.

"Standards of permissible statutory vagueness are strict in the area of free expression." Id. The extent of the protection accorded by the otherwise undefined exception is uncertain and provides no notice of what is permitted or prohibited. "This provision does not eliminate--indeed, it highlights--the overbreadth and resultant chilling effect of the proposed rule." 88 Harv. L. Rev. 1911, 1922 n.74 (1975). The exception itself is unconstitutionally vague.[51/] The system of prior restraint imposed by the orders thus will work its harm by compelling parties and counsel to "steer far wider of the

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51/ Hirschkop v. Snead, 594 F.2d 356, 372-373 (4th Cir. 1979); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 259 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976); CBS, Inc. v. Young, 522 F.2d 234, 239-240 (6th Cir. 1975); Zarate v. Younglove, 86 F.R.D. 80, 101 (C.D. Cal. 1980).

unlawful zone." Speiser v. Randall, 357 U.S. 513, 526 (1958), quoted in New York Times Co. v. Sullivan, supra, 376 U.S. at 279. Neither the orders nor the exception in the June 22 order is "'closely drawn to avoid unnecessary abridgement of associational freedoms.'" In re Primus, supra, 436 U.S. at 432, quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976).[52]

52/ The filing requirement increases the harm. "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective ... restraint on freedom of association." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958). The filing requirement extends to every communication, including communication protected as attorneys' work product. See, Hickman v. Taylor, 329 U.S. 495 (1947). "To the extent that such communications contain information as to class counsel's view of the case or the decisions of class counsel as to tactics or strategy, the failure to serve the party opposing the class makes the communications an ex parte contact with the court which infringes the rights of the defendant, but service of the communication on the party opposing the class would give the class opponents the benefits of discovery in areas which are normally privileged." Seymour, The Use

The related claim that the exception allows constitutional challenge to restraint as a defense to criminal contempt, Br, p. 33, is adequately disposed of by the dissent to the panel opinion[53/]

52/ continued

of Claim" Forms and Gag Orders in Employment Discrimination Class Actions, 10 Conn. L. Rev. 920, 942 (1978).

53/ "The majority's conclusion that the assertion of a good faith belief gives total protection is disingenuous. The district court would still be entitled to inquire into the bona fides of counsel's belief. Because counsel may be called upon to establish the basis for his good faith belief, and therefore is put at risk for possibly violating the court's order, the good faith exception does not ameliorate the chilling effect of the order. It is little comfort for a conscientious attorney to be told that he may communicate with potential class members but that at a later time may be called upon by the court to justify the communication. Even if facially a cure, the constitutional exception is no cure as applied to these plaintiffs who prudently asked for pre-distribution approval of the leaflet reproduced [as Addendum B] rather

and by the en banc majority opinion.[54/] Systems of prior restraint with similar formalistic but ineffective "safety valves" have been struck down because the system in operation "'dampens the vigor and limits the variety of public debate.'" Miami Herald Publishing Co. v. Tornillo, supra, 418 U.S. at 257. See, supra at p. 64.

The rule proposed by petitioners in practice is unworkable as a matter of fairness and judicial economy. If, as petitioners suggest, an immediate appeal of a finding of contempt is required every time there is restraint, prosecution of the lawsuit on the merits will be handicapped and the appellate courts will be inundated with cases requiring supervision of minute details of barred class communication. If, on the other hand,

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53/ continued

> than risk post-distribution filing and were given a belated denial."

(JA 227-228) (footnotes omitted).

54/ The "good faith" defense "is not found within the order but was read into it by the panel majority", and "[e]ven if this construction is correct, the defense is so freighted with preconditions and uncertainties that it is little comfort to attorney or party ..." (JA 250-252).

plaintiffs and their counsel are required to remain silent pending final judgment before obtaining appellate review, their rights to free expression and association often will be irretrievably lost. It will soon be five years since the communication orders below were issued. If plaintiffs prevail on appeal, retrial may be necessary. Finally, if plaintiffs and their counsel simply ignore the court's order and exercise their First Amendment rights, they may be precluded from asserting those rights on appeal at all. See, Walker v. City of Birmingham, 388 U.S. 307, 316-317 (1967). In any event, the harm worked by the orders on a fundamental right of meaningful access to the courts will have been done.

D. The Orders Are Overbroad.

> "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.
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> * * *
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> "Broad prophylactic rules in the area of free expression are suspect. ... Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."

NAACP v. Button, supra, 371 U.S. at 433, 438; In re Primus, supra, 436 U.S. at 432-433; Nebraska Press Association v. Stuart, supra, 427 U.S. at 568; Village of Schaumburg v. Citizens for a Better Environment, supra, 444 U.S. at 637.[55/] In Button and In re Primus, this principle was applied to strike down similarly broad prohibitions of alleged solicitation by attorneys engaged in civil rights and civil liberties enforcement actions.[56/] Even a legitimate governmental

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55/ See, In re Halkin, supra, 598 F.2d at 193-194; Hirschkop v. Snead, supra, 594 F.2d at 373; Chicago Council of Lawyers v. Bauer, supra, 522 F.2d at 257-259.

After its analysis of the order as a prior restraint, the en banc majority stated that "the unconstitutionality of the order does not rest on that ground alone. Even under the more relaxed analysis accorded subsequent restraints the order fails to pass constitutional muster." (JA 266-267 n.33).

56/ In In re Primus, the Court stated that,

> "At bottom, the case against appellant rests on the proposition that a State may regulate in a prophylactic fashion all solicitation activities of lawyers because there may be some potential for overreaching,

purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479, 488 (1960).

The district court's orders simply are not "narrowly drawn regulations designed to serve [legitimate] interests without unnecessarily interfering with First Amendment freedoms." Village of Schaumburg v. Citizens for a Better Environment, supra, 444 U.S. at 637. The majority en banc opinion was clearly right that "[i]t is obvious that overbreadth is inevitable under a system by which plenary restraints are imposed automatic-

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56/ continued

> conflict of interest, or other substantive evils whenever a lawyer gives unsolicited advice and communicates an offer of representation to a layman. Under certain circumstances, that approach is appropriate in the case of speech that simply "propose[s] a commercial transaction," Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973). See Ohralik [v. Ohio State Bar Assn., 436 U.S. 447] at 455-459. In the context of political expression and association, however, a State must regulate with significantly greater precision."

In re Primus, supra, 436 U.S. at 437-438.

ally by rule or order in every actual or potential class action." (JA 264 n.32). The communications orders operated as a blanket prohibiton, and included in their coverage the very kind of activity legitimated in Button and In re Primus.

The orders clearly transgressed the requirement that "'broad rules framed to protect the public and to preserve respect for the administration of justice' must not work a significant impairment of 'the value of associational freedoms.'" In re Primus, 436 U.S. at 426, quoting Mine Workers, supra, 389 U.S. at 222. The terms of the May 28 prohibition were all-inclusive, and the August 10 order was directly aimed at protected expression. The provision in the June 22 order for assertion of a constitutional right to communicate on pain of criminal contempt does not save the orders from overbreadth. NAACP v. Button, supra, 371 U.S. at 437-438. See, supra at pp. 65-67. "First Amendment interests are fragile interests, and a person who contemplates protected activities might be discouraged by the in terrorem effect of the statute." Bates v. State Bar of

Arizona, supra, 433 U.S. at 380; see, Nebraska Press Association v. Stuart, 427 U.S. 539, 568 (1976).

II

THE ORDERS RESTRAINING COMMUNICATIONS VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

A. The Due Process Clause Guarantees Plaintiffs and Potential Class Members Significant Procedural Rights.

The district court restricted the right of plaintiffs and plaintiffs' counsel to communicate with potential class members, permitted certain communications between Gulf and potential class members, denied a specific request by plaintiffs' counsel to communicate, and instructed the court clerk to send the class members a notice regarding Gulf's offer of settlement. These actions deprived plaintiffs and potential class members of their rights guaranteed by due process of law.

> "The constitutional right to due process is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his

> possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivation of property ...."

Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972).

The protection of property afforded by the requirements of due process "has been broadly read to extend protection to 'any significant property interest,'" id., 407 U.S. at 86, quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971), including statutory entitlements, "whether the entitlement is denominated a 'right' or a 'privilege'." Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970). The right to equal employment opportunity and freedom from discrimination created by Title VII is "of the 'highest priority'," Alexander v. Gardner-Denver Co. 415 U.S. 36, 47 (1974), and casts private litigants and their counsel in a central enforcement role. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416-417 (1978).

Due process may not be ignored to satisfy concerns for efficiency or for the expeditious resolution of disputes.

> ".. [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the ... Due Process Clause... that [it was] designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

Stanley v. Illinois, 405 U.S. 645, 656 (1972) (footnote omitted).

The "shortcut" procedure followed by the district court, as is the case with many procedural shortcuts which ignore due process, may result in much more complex, lengthy and uncertain litigation. Cf., Hansberry v. Lee, 311 U.S. 32 (1940); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). If the waivers of potential class members' rights under the fair employment laws were solicited by Gulf in a manner which precluded the class members from making a "knowing and voluntary" choice because they were presented with one-sided, inadequate information and denied the effective assistance of counsel, then those waivers would not bar further litigation on

behalf of the class members who signed them.[57] See, Alexander v. Gardner-Denver Co., supra, 415 U.S. at 52 n.15. In fact, in fair employment cases, where "laymen, unassisted by trained lawyers, initiate the process," Love v. Pullman Co., 404 U.S. 522, 527 (1972), the possibility that conciliation procedures may deny individuals due process is of particular concern.[58]

57/ The possibility that future litigation may provide a remedy for the class members who did not knowingly or voluntarily sign the waiver does not remove the obligation to insure that the district court afforded due process during the period of solicitation of waivers. "... [N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right to procedural due process has already occurred. 'This Court has not ... embraced the general propositon that a wrong may be done if it can be undone.'" Fuentes v. Shevin, supra, 407 U.S. at 81-82, quoting Stanley v. Illinois, 405 U.S. 645 (1972).

58/ See, e.g., Mosley v. St. Louis Southwestern Ry., 634 F.2d 942, 945-946 (5th Cir. 1981) (court invalidated waiver because an EEOC official failed to present settlement to plaintiff's attorney, but rather presented offer directly

B. Adequate Information Was Denied.

It is fundamental that due process of law requires the right to information, or "notice and an opportunity to be heard [which] 'must be granted at a meaningful time and in a meaningful manner.'" Fuentes v. Shevin, supra, 407 U.S. at 80, quoting Armstrong v. Manzo, 380 U.S. 545 (1965). Moreover, "... when notice is a person's due, process which is mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).

The orders here stand the Mullane formula on its head. Gulf, the party which has an interest antagonistic to potential class members, was afforded a central role in providing them with notice and information concerning the conciliation agreement, while the plaintiffs, who have essen-

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58/ continued

to the charging party); Winfield v. St. Joe Paper Co., 20 FEP Cases 1103, 1108-14 (N.D. Fla. 1979) (court invalidated waivers because the EEOC officials had provided misleading and inadequate information).

tially the same interest as the class members, and plaintiffs' counsel, who have a legal obligation to represent the interests of the class members, 59/ were prevented from communicating with the potential class.

59/ Gulf states that "it appears that the attorney-client relationship between counsel for the named plaintiffs and purported class members is created when the court certifies the class and designates the class representative and his counsel." Br, p. 19, n.12 (emphasis added). Contrary to Gulf's supposition, class counsel are ethically obligated to take all actions necessary for the protection of the interests of a class member until the class member elects to place his or her personal claim in the hands of another attorney. "[C]lass action counsel possess, in a very real sense, a fiduciary obligation to those not before the court." Greenfield v. Villager Industries, Inc., 483 F.2d 824, 832 (3d Cir. 1973) (footnote omitted). Therefore, the failure to appeal a denial of class certification has been described as an "abdication" of responsibilities. Romasanta v. United Airlines, Inc., 537 F.2d 915, 918, 919 (7th Cir. 1976), aff'd sub nom. United Airlines v. McDonald, 432 U.S. 385 (1977). See Seymour, The Use of "Proof of Claim" Forms and Gag Orders in Employment Discrimination Class Actions, 10 Conn. L. Rev. 920, 928-929 n.64 (1978).

Pursuant to the conciliation agreement, Gulf prepared and sent a letter dated May 1, 1976[60/] to covered persons. The May 1 notice stated that if an employee did "not understand" Gulf's offer, the employee should contact a Gulf manager, C.B. Draper, in order to "arrange an interview with a government representative." The letter specifically discouraged the employee from consulting with any other person, including an attorney: "Because this offer is personal in

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59/ continued

The attorney for the class has an obligation to ensure that the interests of all the class members are protected. Accordingly, the inquiry under Rule 23(a)(4), Fed. R. Civ. Proc., as to whether "the representative parties will fairly and adequately protect the interests of the class" focuses upon the "adequacy" of the attorneys for the class. North American Acceptance v. Arnall, Golden & Gregory, 593 F.2d 642, 644, n. 4 (5th Cir. 1979); Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 247 (3d Cir.), cert. denied 421 U.S. 1011 (1975). The obligation of the class attorney commences with the filing of the complaint and not just with the certification of the class by the court.

60/ This letter is attached to this brief as Addendum A. See, supra, p.6, n.7.

nature, Gulf asks that you not discuss it with others."

The order of June 22 sanctioned the one-sided presentation of information to potential class members. See, supra at 20-22. It specifically permitted Gulf to contact potential class members through the district court for the purpose of offering "back pay" settlements and soliciting releases. The district court ordered that a notice be sent to class members who had failed to accept Gulf's offer. The notice not only improperly gave "the official imprimatur of the court," (JA 216) (panel opinion, Godbold, J., dissenting), to the making of settlement offers and solicitation of releases by Gulf, but also failed to notify black employees of the availability of class counsel or even of the possibility of obtaining independent legal advice.

Under the June 22 order, company officials and supervisors were also free to discuss the case with their black employees and to offer their views on subjects ranging from the adequacy of the company's conciliation agreement and settlement offers to the reputation of plaintiffs' counsel. As long as these discussions "occurr[ed] in the regular course of business," they were not subject

to any regulation by the court. This was an opportunity for access to potential class members which plainly was not available to plaintiffs and their counsel, and it was open to widespread and unreviewable abuse in the context of the employer-employee relationship.

The unfairness of the procedure was exacerbated by the court's subsequent denial of plaintiffs' request that they and their counsel be permitted to communicate with class members and to distribute a leaflet within the time period for responses to the tender of back pay. The leaflet notified black employees of the existence of the lawsuit as an alternative to acceptance of Gulf's offer and urged them to talk to an attorney. Addendum B. The district court waited until two days after the period for acceptance of the tender offer and then prohibited the distribution of the leaflet and denied the right to communicate. See, supra at p. 24.

The restrictions on communications were so unfair and one-sided, and the failure to provide for or to permit adequate notice and information was so contrary to the requirements of Mullane and

Fuentes, that they constitute a denial of due process of law in violation of the Fifth Amendment. Cf., JA 213-216 (Godbold, J., dissenting from the panel decision). In addition, the orders violate the due process clause because they constitute a federally-imposed discrimination which, if enforced by a state, would violate the equal protection clause of the Fourteenth Amendment. Bolling v. Sharpe, 347 U.S. 497 (1954); Johnson v. Robison, 415 U.S. 361, 364 n.4 (1974).[61]

C. Effective Assistance of Counsel Was Denied.

The right to notice, adequate information and an opportunity to be heard, "'would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel....' Counsel

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61/ "The right to equal protection of the law in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has firmer foundation that the whims or personal opinions of a local governing body." Niemotko v. Maryland, 340 U.S. 268, 272 (1951); Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940); cf. Cox v. Louisiana, 379 U.S. 559, 581 (1965) (Black, J., concurring); see also, Cox v. Louisiana, 379 U.S. 536, 557 (1965).

can help delineate the issues ... and generally safeguard the interests of the [class members]." Goldberg v. Kelly, 397 U.S. 254, 270 (1970). Counsel may provide the necessary information and advice which will give "reality [and] worth" to the right to be heard by providing the class member adequate information in order that he may "choose for himself whether to appear or default, acquiesce or contest." See, Mullane v. Central Hanover Bank & Trust Co., supra, 339 U.S. at 314. The plaintiffs and their black coworkers have a right "to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 7 (1964). The free and private flow of communications between these workers and the attorneys representing their interest must be protected because "[l]aymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries, cf., Gideon v. Wainwright, 372 U.S. 335." Id.[62/]

62/ The right to retain counsel and to be heard by counsel in civil litigation is implicit in the concept of Fifth Amendment due process. "If in

Due process may not require the appointment of counsel, even where, as here, important civil rights are at stake, but due process does require that district courts not arbitrarily or unfairly restrict the right of potential class members to class counsel who are available and obligated to represent their interests. Not only did the orders prohibit communication between the class counsel and potential class members, but the orders prohibited notice, as requested by plaintiffs, that class counsel were available for consultation or that other attorneys might assist them in making a determination whether or not to accept Gulf's offer of back pay.[63/]

62/ continued

any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." Powell v. Alabama, 287 U.S. 45, 69 (1932) (emphasis added); Cooke v. United States, 267 U.S. 517, 537 (1925); Potashnick v. Port City Construction Co., 609 F.2d 1101, 1118 (5th Cir. 1980). See also, Note, The Right To Counsel in Civil Litigation, 66 Colum. L. Rev. 1322 (1966).

63/ "The order permits a potential class member to confer with attorneys for plaintiffs at the

The infringement upon potential class members' access to effective assistance of counsel is particularly egregious in this case. Access was denied during a period when potential class members were required to make a decision on whether or not to accept Gulf's back pay offer[64/] and waive their right to litigate their civil rights claims. The orders magnified the harm created by Gulf's erroneous and self-serving

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63/ continued

prospective class member's request. Pragmatically, this is a dubious exception. A prospective class member must find out who the attorneys are and when and where to see them; but the actual class members are forbidden to give him this information -- or any other information about the case -- without prior court approval, nor can counsel furnish this information to potential class members generally." (JA 214) (Goldbold, J., dissenting from the panel decision).

64/ The offer also included the acceptance of certain injunctive remedies. See, supra at pp. 4-5. Incredibly, neither the letter prepared and sent by Gulf, Addendum A, nor the notice sent by the court, JA 103-104, mentioned the injunctive remedy or otherwise discussed the remedies provided by the conciliation agreement. Moreover, no information was provided as to whether or not more or different injunctive remedies might be available if the offer were refused and the claims litigated.

instruction to the class members -- that a potential class member's claim should not be discussed with "anyone." Without the assistance of professional advice, a potential class member could not be expected to have the experience and sophistication to fully understand the complex choice provided by the back pay offer. Both this Court, Love v. Pullman, supra, 404 U.S. at 526-527, Oscar Mayer & Co. v. Evans, 441 U.S. 750, 761 (1979), and Congress have observed that "aggrieved individuals [under Title VII] ... frequently are untrained laymen who are not always aware of the discrimination which is practiced against them..." Section-by-Section Analysis of S. 2515, the Equal Employment Employment Opportunity Act of 1972, 118 Cong. Rec. 940-941 (1972). Respondents submit that, rather than restricting the contact of lawyers in Title VII class actions with class members, justice and the policies of Title VII would be better served by requiring lawyers to have sufficient contact with class members to insure fair and full representation of their interests.[65/]

65/ Congress has recognized the critical role of private counsel in enforcing the policy of Title

The denial of the effective assistance of counsel did not stop when the period for consideration of Gulf's settlement offers terminated. The district court's orders continued to impair severely the ability of plaintiffs' counsel to provide proper representation to the plaintiffs and to the potential class members.

The Manual, at 34, recognizes that class members often have knowledge of the relevant facts and that "to require a party to develop the case without contact with such witnesses may well constitute a denial of due process." However, plaintiffs and their counsel were not permitted to contact and interview black employees who had knowledge of the facts, whose experience and assistance were necessary in framing litigation

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65/ continued

VII and protecting the rights of individuals by providing that a court should ordinarily award attorneys' fees to a prevailing plaintiff, see Christiansburg Garment Co. v. EEOC, supra, and by providing that "the court may appoint an attorney for [a] complainant," 42 U.S.C. §2000e-5(f)(1). See, e.g., Caston v. Sears, Roebuck & Co., 556 F.2d 1305 (5th Cir. 1977); Hilliard v. Volcker, 24 FEP Cases 1516 (D.C. Cir. 1981).

and settlement strategy, and who were potential witnesses, unless they first obtained the court's approval of both the proposed communication and its intended recipients.[66/] If the court approved, plaintiffs' counsel were required to conduct countless limited interviews; any meaningful exchange or discussion would have been impossible, since counsel were permitted to ask only approved questions and were not allowed to follow up on new information revealed by the class members' answers. There was no corresponding restraint on defendants and their counsel: Gulf's lawyers were free to consult with management and supervisory employees to develop the facts, interview witnesses, prepare for trial, and discuss strategy without any restrictions whatever.

The restraints on communication denied effective assistance of counsel to the class members. See, Brotherhood of Railroad Trainmen v. Virginia, supra, 377 U.S. at 7. Interference with an employee's right to discuss the case with an attorney representing his interests, without

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66/ The assertion of a "constitutional right to communicate" under the June 22 order provides no real protection. See supra at pp. 62-70.

the fact of that discussion being known to his employer, may destroy the right to consult a lawyer at all. Cf., NAACP v. Alabama, supra, 357 U.S. at 462. Moreover, plaintiffs' counsel are effectively deprived of the opportunity to canvass employees for relevant data, to learn the desires and attitudes of class members regarding proposed forms of relief, and most importantly, to obtain information from employees who are too timid to aid plaintiffs publicly. This Court has recognized the importance of confidential communications between employees and their representatives in litigation.

> "The danger of witness intimidation is particularly acute with respect to current employees--whether rank and file, supervisory, or managerial--over whom the employer, by virtue of the employment relationship, may exercise intense leverage. Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases held up, and other more subtle forms of influence exerted. A union can often exercise similar authority over its members and officers. As the lower courts have recognized, due to the 'peculiar character of labor litigation[,] the witnesses are especially likely to be inhibited by fear of the employer's or--in some cases--the union's capacity for reprisal and harassment.' Roger J. Au & Son, Inc. v.

> NLRB, 538 F.2d 80, 83 (CA3 1976). Accord, NLRB v. Hardeman Garment Corp., 557 F.2d 559 (CA6 1977). While the risk of intimidation (at least from employers) may be somewhat diminished with regard to statements that are favorable to the employer, those known to have already given favorable statements are then subject to pressure to give even more favorable testimony."

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 240 (1978). Cf., 42 U.S.C. § 2000e-3(a) (unlawful for employers to retaliate against employees who invoke Title VII or who assist or participate in Title VII proceedings); Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969).

Plaintiffs and their counsel are deprived even of the basic right to conduct private interviews of potential witnesses in preparation for trial. The June 22 order ignores the settled principle that such interviews are part of an attorney's work product and as such are not subject to forced disclosure unless the opposing party makes a specific showing of undue hardship or prejudice. Hickman v. Taylor, 329 U.S. 495 (1947). The Second Circuit has reversed a district court's order which forbade counsel to interview adverse witnesses except in the presence of opposing counsel or a stenographer who could

make a transcript of the interview available to the court. The court recognized, relying on Hickman, "the legitimate need for confidentiality in the conduct of attorneys' interviews, ...[and] maximizing unhampered access to information ... [in order to] insur[e] the presentation of the best possible case at trial." IBM Corp. v. Edelstein, 526 F.2d 37, 42 (2d Cir. 1975). The Second Circuit regarded it as

> "a disservice both to the parties and to the Court to subject to the Court's scrutiny the process by which counsel researches, develops and integrates the case which he ultimately presents.... To require that his initial investigatory efforts be of a quality which counsel would willingly include as part of his client's final case is to set up an impossible standard; to ask him to submit his initial probings, notwithstanding their lack of effectiveness in his client's behalf, is in effect to ask counsel to deny his client the effective representation to which he is entitled. See, Code of Professional Responsibility, Canon 7."

526 F.2d at 42. The Second Circuit therefore held that the restrictions unduly infringed counsels' ability to prepare the case for trial and impaired the constitutional right to effective assistance of counsel. Id.

The court's order in the instant case denies even more fundamental rights: it imposes unconsti-

tutional retrictions not simply on private interviews with an opposing party's witnesses, but on interviews by plaintiffs' counsel with their own prospective witnesses. By requiring prior disclosure and approval by the court of both the identity of potential witnesses and the substance of proposed interviews, the order destroys the confidentiality of those interviews and thus deprives plaintiffs and their class of an essential element of effective representation by counsel.

D. An Adequate Hearing and Procedural Regularity Were Denied.

"For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard...' Baldwin v. Hale, 68 U.S. 223, 233...." Fuentes v. Shevin, supra, 407 U.S. at 80. Due process permits a variance in the form and scope of a hearing "appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., supra, 339 U.S. at 313; Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961); Boddie v. Connecticut, 401 U.S. 371, 378 (1971). But the Court has "traditionally insisted

that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect." Fuentes v. Shevin, supra, 407 U.S. at 82.

In support of its motions requesting restrictions on communications, Gulf relied upon unverified statements of unnamed informants who asserted that plaintiffs' counsel engaged in "improper" conduct. These statements were rebutted by sworn statements of plaintiffs' counsel denying the unsworn hearsay. The district court explained neither the factual nor the legal basis for its orders; the court did not issue findings of fact or conclusions of law.[67/] "[I]ssuance of an order ... without an adequate statement of the reasons for the order does not meet minimum standards of procedural fairness and regularity." Sargeant v. Sharp, 579 F.2d 645, 647 (1st Cir. 1978). See, supra at part I B of the argument.

67/ Gulf, recognizing the indefensibility of the unexplained orders, speculates as to the legal reasoning of the lower court. Gulf states that "[a]fter assuring itself that the conciliation agreement provided complete relief (JA 71-80), the district court granted the request [made by Gulf] to resume the conciliation process ... " Br, p. 25. First, there is nothing in the record to suggest that the court reviewed the

Finally, the district court even failed to timely consider the plaintiffs' motion to communicate with class members during the period when Gulf made its back pay offers and solicited waivers. It is unnecessary in this case to indicate the precise form of hearing which due process requires in these circumstances. See,

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67/ continued

conciliation agreement or the applicable law, much less that it "assured itself" that the "agreement provided complete relief." Second, in support of its assertion Gulf refers merely to the conclusory statements of government officials; facts regarding the sufficiency or lack of sufficiency of the agreement were never presented to the court. Third, the agreement standing by itself raises considerable doubt as to whether or not it provides full relief. See, supra, pp.7-8, n.8.

For example, the affirmative action provisions appear to lock in discrimination. The agreement provides for a "goal" to fill one of every five vacancies in some "target classifications" and one of every seven vacancies in other such classifications with "a Negro, a Spanish-surnamed American or a female." See, supra, pp. 4-5, n.5. Gulf may meet these goals through hire or promotion. Id. It is clear that the ratio for "affirmative action" selection, 20% or 14%, is substantially below the level of blacks, Spanish-surnamed Americans and women in the relevant labor force. This is true regardless of how the appropriate labor market is defined, as demonstrated by

supra, at pp. 93-94. Under any possible standard, the procedures followed by the district court

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67/ continued

the following table.

	% Minorities and Women	% Blacks	% SSA	% White
SMSA Workforce	46.37	18.9	3.75	23.72
SMSA "Blue Collar"	27.11	19.9	4.18	3.03
Port Arthur Workforce	59.49	34.58	6.13	18.78
Port Arthur "Blue Collar"	47.10	37.43	6.96	2.71

SOURCE: U.S. Bureau of the Census, 1970 Census of Population, General Social and Economic Characteristics, PC (1) - (45) (Texas), Table 86 at pp. 542-543, Table 93 at pp. 633-634, Table 99 at pp. 711-712 ("Blue Collar" includes persons listed as "craftsmen, foremen and kindred workers," "operatives, except transport and equipment operatives" and "laborers, except farm").

Thus the proportion of blacks, Spanish-surnamed Americans and women in the possible relevant workforces for the production and maintenance jobs varies from 27.11% to 59.49%. There was no explanation presented to the district court, or to the black workers, for the "affirmative action goals" of 14% or 20% which were, in fact, substantially below the proportion of blacks, Hispanics and women which would be expected to fill Gulf's jobs even in the absence of affirmative action.

failed to conform to due process.

III

THE ORDERS ARE INCONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE. 68/

The source of the district court's authority to regulate the conduct of class actions is Rule 23(d), Fed. R. Civ. Pro., which provides that courts may make "appropriate order[s]" dealing with procedural matters in Rule 23 actions. Orders and local rules inconsistent with Rule 23 are unauthorized. See, e.g., Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-178 (1974) (preliminary inquiry as to merits); Coles v. Marsh, supra, 560 F.2d at 189 (communications order); Rodgers v. United States Steel Corp., supra, 508 F.2d at 163-164 (communications rule). 69/

68/ Constitutional adjudication may be unnecessary if non-constitutional grounds are dispositive. See, Hagans v. Lavine, 415 U.S. 528, 549 (1974); Rodgers v. United States Steel Corp., 508 F.2d 152, 163-164 (3d Cir.), cert. denied, 423 U.S. 832 (1975).

69/ See also, Sanders v. Russell, 401 F.2d 241, 245-248 (5th Cir. 1968); McCargo v. Hedrick,

A. The Orders Are Inconsistent with Rule 23.

Rule 23(d) "is concerned with the fair and efficient conduct of the action." Advisory Committee Notes, Proposed Rules of Civil Procedure, 39 F.R.D. 69, 106 (1966). The general purpose of the class action procedure is to "achieve economies of time, effort and expense, and [to] promote uniformity of decisions as to persons similarly situated." Id. at 102, 103 (Rule 23(b)(3)). Often "[e]conomic reality dictates that [a] suit proceed as a class action or not at all," Eisen v. Carlisle & Jacquelin, supra, 417 U.S. at 161.

69/ continued

545 F.2d 393, 401-402 (4th Cir. 1976). Local rules are authorized by Rule 83, Fed. R. Civ. Pro. (a district court "may from time to time make and amend rules governing its practice not inconsistent with these rules"), and 28 U.S.C. §2071 (district court "rules shall be consistent ... with rules of practice and procedure prescribed by the Supreme Court"). Thus, local rules must conform to Rule 23. Rodgers v. United States States Steel Corp., supra, 508 F.2d at 163-164.

> "The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."

Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326, 339 (1980). Thus, "the First Amendment principle that groups can unite to assert their rights as effectively and economically as practicable," United Transportation Union v. State Bar of Michigan, supra, 401 U.S. at 580, is consistent with the purposes of class action litigation.[70/]

Moreover, injunctive and declaratory relief

70/ Petitioners mistakenly assert that the Court has construed Rule 23 to grant the courts "broad authority" to enter appropriate orders because "class actions are a special kind of litigation." Br, p. 14. Instead, the Court has found that judicial authority to regulate class actions is bounded by the language and history of Rule 23. Eisen v. Carlisle & Jacquelin, supra, 417 U.S. at 177 (notice requirements and preliminary determi-

actions under Rule 23(b)(2) were specifically intended to include "various actions in the civil rights field where a party is charged with dis-

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70/ continued

nation of merits); see, Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 356 et seq. (1978). In Coopers & Lybrand v. Livesay, 437 U.S. 463, 470 (1978), where the issue was the "death knell" doctrine of interlocutory appeal, the Court specifically declined to be drawn into the debate over whether the class action is "a vexatious kind of litigation" or "serves a vital public interest," because "policy arguments, though proper for legislative consideration, are irrelevant to the issue we must decide."

> "There are special rules relating to class actions and, to that extent, they are a special kind of litigation. Those rules do not, however, contain any unique provisions governing appeals. The appealability of any order entered in a class action is determined by the same standards that govern appealability in other types of litigation."

Id. In Deposit Guaranty National Bank v. Roper, supra, 445 U.S. at 339, where the issue was appealability and mootness, the Court again specifically declined an invitation to stem the "potential for misuse of the class action mechanism."

criminating against a class," Advisory Committee, Note, supra, 39 F.R.D. at 103, such as the instant action. "Suits alleging racial or ethnic

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70/ continued

> "That there is a potential for misuse of the class-action mechanism is obvious. Its benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries. But the remedy for abuses does not lie in denying the relief sought here, but with re-examination of Rule 23 as to untoward consequences."

The "potential for misuse" referred to in Roper is plaintiffs' counsel's incentive to increase the size of the class for fee-spreading purposes, a consideration absent here because any fees would be awarded by the court and would not ordinarily depend on the size of the class. Petitioners' reliance on Livesay and Roper is therefore erroneous.

Petitioners' suggestion that "the 'potential for misuse' has often matured into actual abuse of the class action device resulting in harmful effects on the rights of potential class members," Br, p. 15, is indistinguishable from similar claims made in Livesay and Roper, and is "irrelevant," Livesay, supra, 437 U.S. at 470, as a

discrimination are often by their very nature class suits, involving classwide wrongs." East Texas Motor Freight System, Inc. v. Rodriquez, 431 U.S. 395, 405 (1977); Potts v. Flax, 313 F.2d 284, 289 (5th Cir. 1963) (cited by the Advisory Committee). Class action treatment and relief are particularly appropriate in the enforcement of Title VII, which "vest[s] federal courts with plenary powers to enforce the statutory requirements," Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974), in order "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Griggs v. Duke Power Co., 401 U.S. 424, 429-430 (1971). "'The provisions of this subsection are intended to give the courts wide discretion

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70/ continued

matter of law. See, supra pp. 45-48. Of course, on this record showing complete absence of "abuse," the suggestion is also "irrelevant" as a matter of fact, as the Fifth Circuit found. See, supra at 17, 22, 24. As the Court put it in Oppenheimer Fund, Inc. v. Sanders, supra, 437 U.S. at 363, in the context of class member identification expenses, "[a] bare allegation of wrongdoing ... is not a fair reason for requiring a defendant to undertake financial burdens and risks to further a plaintiff's case."

exercising their equitable powers to fashion the most complete relief possible.' ... 118 Cong. Rec. 7168 (1972)." Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1971).[71/] Plaintiffs in Title VII litigation are "private attorneys general vindicating a policy that Congress considered of the highest priority." Franks v. Bowman Transportation Co., 424 U.S 747, 763 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975).

"There is no question but that important speech and associational rights are involved in this effort by the NAACP Legal Defense and Education[al] Fund, Inc., to communicate with potential black class members on whose behalf they seek to litigate issues of racial discrimination." Rodgers v. United States Steel Corp., supra, 508 F.2d at 163. Restrictions on communications such as those imposed in the instant case are also inconsistent with the policy underlying Rule

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71/ "The 1972 amendments retained the private right of action as 'an essential means of obtaining judicial enforcement of Title VII,' Alexander v. Gardner-Denver Co., supra at 45, while also giving the EEOC broad enforcement powers."

General Telephone Co. v. EEOC, 446 U.S. 318, 332-333 (1980).

23 "in favor of having litigation in which common interests, or common questions of law or fact prevail, disposed of where feasible in a single lawsuit," id., and they impair plaintiffs' activities which are "directed toward effectuating the purposes of Rule 23 by encouraging common participation in the litigation of ... discrimination claim[s]." Coles v. Marsh, supra, 560 F.2d at 189. This led the Third Circuit to hold in Rodgers, with respect to a local rule modeled on the Manual, that the district courts were not empowered "to require prior judicial approval of communications between plaintiffs, or their attorneys, and third parties, when such communications seek to encourage common participation in a lawsuit," 508 F.2d at 164. Coles held, with respect to an order substantially similar to the one here, that the district court "lacked power to impose any restraint on communication for the purpose of preventing the recruitment of parties plaintiff or ... the solicitation of financial or other support to maintain the action." 560 F.2d at 189. Similarly, the Fifth Circuit en banc ruled in the instant case that "[b]ecause we hold that the order violates the First Amendment, it

follows that it cannot be an 'appropriate order' under Rule 23(d) of the Federal Rules of Civil Procedure." (JA 268; see, also, JA 269-275 (Tjoflat, J., specially concurring); JA 276 (Fay, J., issuing a special concurring statement)).

B. Rule 23 Should Be Construed So As To Avoid Grave Doubts of Unconstitutionality.

Courts have "favored that interpretation of legislation which gives it the greater chance of surviving the test of constitutionality," and it must be assumed that Congress is "sensitive to and respectful of the liberties of citizens." Ex parte Endo, 323 U.S. 283, 299-300 (1944); Kent v. Dulles, 357 U.S. 116, 130 (1958). The Court does "not assume that Congress chose to disregard a constitutional danger zone," Yates v. United States, 354 U.S. 298, 319 (1957), and has therefore construed provisions "in the direction of constitutional policy." Regional Rail Reorganization Act Cases, 419 U.S. 102, 134 (1974). It has, therefore, long been the rule, as Justice Holmes put it, that "[a] statute must be construed, if fairly possibly, so as to avoid not only the conclusion that it is unconstituitonal, but also grave doubts

upon that score." United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916); United States v. Standard Brewery, 251 U.S. 210, 220 (1920); ICC v. Oregon-Washington R. & Nav. Co., 288 US. 14, 40 (1933). Thus, Rule 23 should be construed as not authorizing the imposition of prior restraint on communications by plaintiffs or their counsel with actual or potential class members in class actions.

CONCLUSION

The opinion and order of the Fifth Circuit en banc should be affirmed.

Respectfully submitted,

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Addendum A

May 1, 1976

Dear Mr. Hayes:

In line with its continuing policy of providing equal opportunity to all employees and annuitants, Gulf has recently entered into an agreement with the United States Equal Employment Opportunity Commission and the U. S. Department of the Interior. As part of the written agreement, Gulf has identified certain employees and annuitants to whom back pay will be offered in settlement of past discrimination claims, even though Gulf does not admit to having discriminated against anyone. You are a member of this group of employees and annuitants, and should you accept the terms of this offer, you will immediately receive by certified mail $1,163.34 less legal deductions for social security, if applicable, and income tax. The amount of your back pay was figured according to your plant seniority date, and very probably will not be the same as that of anyone else presented an offer under the agreement.

Because this offer is personal in nature, Gulf asks that you not discuss it with others. Gulf will likewise respect your complete privacy by not disclosing the amount offered you to other employees or annuitants. Even though both you and Gulf may feel that you have not been discriminated against in any way by Gulf, the money is available to you upon acceptance. To help you make a decision, Gulf wants you to understand that the only condition for accepting back pay is that you sign a written statement releasing Gulf from any possible claims of employment discrimination occurring before the date of your release, including any future effects of alleged past practices. Of course, in all other ways you will retain full rights to administrative and legal processes.

Enclosed you will find a written "Receipt and General Release". You may immediately receive your back pay check by completing all questions on the Receipt and General Release, signing before a Notary Public and returning it in the self-addressed envelope provided. Services of a Notary Public will be provided at no charge by calling 983-3301, ext. 484 or 467. Once you have returned the signed Receipt and General Release, you should receive your check by mail within 7 to 10 days.

If you feel that you cannot respond because you do not understan Gulf's offer, you may contact Mr. C. B. Draper at 983-3301, ext. 467, during normal business hours, to arrange an interview with a governme representative who will answer your questions.

Equal Employment Opportunity Commission

By: James R. Anderson
James R. Anderson

Gulf Oil Co. - U. S.

By: B. F. Short
B. F. Short

Enclosure

ATTENTION BLACK WORKERS OF GULF OIL

The Company has asked you to sign a release. If you do, you may be giving up very important civil rights. It is important that you fully understand what you are getting in return for the release. IT IS IMPORTANT THAT YOU TALK TO A LAWYER BEFORE YOU SIGN. These lawyers will talk to you FOR FREE:

STELLA M. MORRISON
440 Austin Avenue
Room 516
Port Arthur, Texas 77640
(713) 985-9358

BARRY L. GOLDSTEIN
ULYSSES GENE THIBODEAUX
10 Columbus Circle
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New York, New York 10019
(212) 586-8397

CHARLES E. COTTON
348 Baronne Street
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New Orleans, Louisiana 70112
(504) 522-2133

These lawyers represent six of your fellow workers in a lawsuit titled Bernard v. Gulf Oil Co., which was filed in Beaumont Federal Court on behalf of all of you. This suit seeks to correct fully the alleged discriminatory practices of Gulf.

Even if you have already signed the release, talk to a lawyer. You may consult another attorney. If necessary, have him contact the above-named lawyers for more details. All discussions will be kept strictly confidential.

AGAIN, IT IS IMPORTANT THAT YOU TALK TO A LAWYER. Whatever your decision might be, we will continue to vigorously prosecute this lawsuit in order to correct all the alleged discriminatory practices at Gulf Oil.